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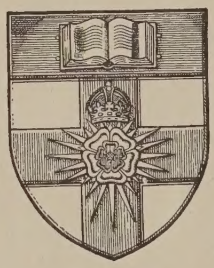

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1893.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

QUEEN'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS ON

CROWN CASES RESERVED

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

EDITOR—A. P. STONE, *Barrister-at-Law.*

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OF

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1893.

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JUDGES

OF

THE QUEEN'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE.

1893.

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1892. 1893.

HOWARD AND ANOTHER *v.* SADLER.

1892
Oct. 28.

Practice—Charging Order—Shares—Director of Company — Qualification — Possession of Shares "in his own right"—1 & 2 Vict. c. 110, *s.* 14.

A director of a railway company, incorporated by an Act providing that the qualification of a director should be the possession in his own right of a certain number of shares, sold his shares; but his name remained on the register as the person entitled to the shares, and he continued to act as a director. A judgment creditor of the director having applied for a charging order on the shares under 1 & 2 Vict. c. 110, s. 14:—

Held, that the director might have possession of the shares in his own right without being the beneficial owner; that there was no illegality in the transaction with regard to the sale of the shares; that the purchasers were not estopped from setting up that they were the persons beneficially entitled; and that a charging order could not be made.

Pulbrook v. *Richmond Consolidated Mining Co.* (9 Ch. D. 610) and *Cooper* v. *Griffin* ([1892] 1 Q. B. 740) followed.

APPEAL by Howard and Mason, judgment creditors, from the order of Pollock, B., discharging a charging order nisi on fifty

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shares in the Oldbury Railway Company, which stood on the register in the name of the judgment debtor, Sadler, against whom Howard and Mason, who were solicitors, had recovered judgment for 43*l.* 9*s.* 10*d.* in respect of professional charges.

The Oldbury Railway Company was originally incorporated by the Dudley and Oldbury Junction Railway Act, 1873 (36 & 37 Vict. c. cliv.), which provided for the nomination of certain directors by the Birmingham Canal Company, and the election of others by the shareholders; by s. 42: "The qualification of a director, except in the case of the directors to be appointed by the Birmingham Canal Company under the power by this Act granted, shall be the possession in his own right of not less than fifty shares."

By the Oldbury Railway Act, 1881 (44 & 45 Vict. c. clxxx.), the power of the Canal Company to appoint directors was repealed, and power was given to the Great Western Railway Company to appoint three directors of the Oldbury Railway Company. Sadler was a director of the Oldbury Railway Company, elected by the shareholders, and possessed as his qualification the fifty shares in question. In 1889 he sold the shares to the Great Western Railway Company; but his name remained on the register as the person entitled to the shares, and he continued to act as a director. It was shewn by an affidavit that all the directors of the Oldbury Railway Company consented to this transaction.

C. Gregson Ellis, for the judgment creditors, in support of the appeal. The judgment debtor is a director of the Oldbury Railway Company, and his statutory qualification for that position is the possession of these shares "in his own right," which must be taken to mean that he is the person beneficially entitled. The transaction by which it was intended that the Great Western Railway Company should obtain the beneficial interest in the shares, while the name of Sadler remained on the register in order to enable him to act as a director, was illegal, and void as against the judgment creditors, or, at least, the parties to it are estopped from setting it up. The position of the judgment creditors is altered, and it does not appear that all parties interested consented to the arrangement; for it is not enough to

shew that the directors of the Oldbury Railway Company consented, and the consent of the shareholders is not shewn. These circumstances distinguish the present case from *Pulbrook* v. *Richmond Consolidated Mining Co.* (1) and *Cooper* v. *Griffin* (2), which turned on articles of association, and a charging order under 1 & 2 Vict. c. 110, s. 14, ought to be made.

J. V. Austin, for the Great Western Railway Company. The case is concluded by the two decisions which have been referred to. The judgment of Jessel, M.R., in the earlier of the two cases is a distinct authority against the contention that there is anything illegal in the arrangement with regard to the shares, and that judgment has been acted upon ever since, and was followed by the Divisional Court and by the Court of Appeal in the later case. There is nothing to create any estoppel as against the Great Western Railway Company. [He also referred to *In re Blakely Ordnance Co.* (3); *Mayor, &c., of Merchants of the Staple of England* v. *Governor and Company of Bank of England.* (4)]

Atherley-Jones, for the judgment debtor.

Ellis, replied.

LORD COLERIDGE, C.J. This appeal must be dismissed. I regret the state of the law; but I concur in the view expressed by the Court of Appeal in *Cooper* v. *Griffin* (2), where they held that, as *Pulbrook* v. *Richmond Consolidated Mining Co.* (1) had been decided several years previously, and had been constantly acted upon, the interpretation put upon the articles of association in that case ought to be adopted. It would introduce great confusion into business if after the lapse of so many years the Court were now to refuse to follow the decision in *Pulbrook* v. *Richmond Consolidated Mining Co.* (1). What was said in that case has been somewhat reflected on; but the decision remains, and in *Cooper* v. *Griffin* (2) the Divisional Court, of which I was a member, felt bound by *Pulbrook* v. *Richmond Consolidated Mining Co.* (1), though not altogether liking the judgment, and the Court of Appeal upheld our decision. It is most important that the public should know what the law is in such cases. It is

(1) 9 Ch. D. 610.
(2) [1892] 1 Q. B. 740.
(3) 25 W. R. 111.
(4) 21 Q. B. D. 160.

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suggested that there are distinctions in the present case; but I cannot see them, and I think that we should be deciding inconsistently with the judgments of the Divisional Court and the Court of Appeal in *Cooper* v. *Griffin* (1) if we were to give effect to this contention.

WILLS, J. I am of the same opinion. I think the decision in *Pulbrook* v. *Richmond Consolidated Mining Co.* (2) governs the present case; but I agree with the view expressed by Cotton, L.J., in *Bainbridge* v. *Smith* (3), and I regret the state of the law which follows from the judgment in the earlier case, because I think the tendency is to help people who wish to hold a sham qualification. I should have been inclined to think that where a director was required to hold shares in his own right he should be personally and beneficially interested; but several years ago it was decided otherwise in the case to which I have referred, and recently the Court of Appeal in *Cooper* v. *Griffin* (1) has followed that decision, though not without some reluctance. It is contended that the present case is distinguishable on the ground that *Pulbrook* v. *Richmond Consolidated Mining Co.* (2) and *Cooper* v. *Griffin* (1) turned on articles of association; whereas here the point turns on the meaning of a similar qualification required by an Act of Parliament, and therefore the words ought to receive a different construction. But the articles of association and the statute relate to similar subject-matters, and I can see no reason whatever why they should not be construed in the same sense. It is also contended that the directors of the Great Western Railway Company enabled Sadler to commit a fraud by obtaining credit on the faith of his possession of the shares; but what they did was lawful, for allowing Sadler's name to remain on the register did not, as the law has been decided, imply that he was the beneficial owner of the shares. According to the decisions the directors made no misstatement, for what they allowed to be stated was the truth, and therefore there can be no estoppel. The judgment creditors also rely on some expressions in the judgment in *Cooper* v. *Griffin* (1), as shewing that if the judg-

(1) [1892] 1 Q. B. 740. (2) 9 Ch. D. 610.
(3) 41 Ch. D. 462, at p. 472.

ment debtor did anything calculated to mislead there would be an estoppel; but there is nothing in the judgment of Collins, J., in that case which can bear any such meaning, and the proposition is unreasonable.

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Appeal dismissed.

Solicitor for judgment creditors: *A. F. V. Wild.*

Solicitor for judgment debtor: *Philip J. Rutland, for J. E. Meade, Birmingham.*

Solicitor for Great Western Railway Company: *R. R. Nelson.*

P. B. H.

[IN THE COURT OF APPEAL.]

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Nov. 7.

OPPENHEIM & CO. *v.* SHEFFIELD.

Practice—Discovery—Interrogatories, setting aside or striking out—Order XXXI., *r.* 7.

By Order XXXI., r. 7, "any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous."

Held, that the above rule applies to interrogatories administered with leave as well as to those administered without leave; and that under its terms all or any of a set of interrogatories may be set aside as being unreasonably or vexatiously exhibited, or may be struck out as being prolix, oppressive, unnecessary, or scandalous.

If the Court are of opinion, looking at a set of interrogatories as a whole, that they are unreasonably or vexatiously exhibited, or are prolix, oppressive, unnecessary, or scandalous, they may set aside or strike out the whole of the interrogatories, although there may be some interrogatories among them which, taken alone, would be unobjectionable.

Sammons v. *Bailey* (24 Q. B. D. 727) disapproved of.

APPEAL from the order of a Divisional Court (Lord Coleridge, C.J., and Cave, J.), affirming an order of Day, J., at chambers setting aside interrogatories.

The action was brought by the plaintiffs, who were stockbrokers, against the defendant for a balance of account for work done and money paid for the defendant by the plaintiffs, as his stockbrokers, in respect of the purchase, and sale, and carrying over of various stocks, shares, and securities between June 13, 1890, and January 29, 1891, and for commission due to the plaintiffs in respect thereof, and for interest as agreed.

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The defendant, by his defence, pleaded in denial of his indebtedness to the plaintiffs, and set up a counter-claim, claiming an account of the transactions between the plaintiffs and himself from the beginning, and payment of such amount as might be found to be due from the plaintiffs to himself on taking such account.

The plaintiffs, in their reply (inter alia), in substance alleged that accounts had from time to time been rendered by them to the defendant which fully shewed the transactions in question, and that the defendant, with full knowledge and information, accepted and agreed the accounts so rendered to him by the plaintiffs as being true and accurate, and the said accounts were settled and agreed between the plaintiffs and the defendant.

The defendant obtained leave to administer, and administered interrogatories to the plaintiffs in support of his counter-claim. These interrogatories, which were very numerous and lengthy, interrogated in great detail as to the particulars of the transactions and as to a great many of the items of the accounts between the plaintiffs and the defendant. (1) The plaintiffs applied at chambers, under Order XXXI., r. 7, that the interrogatories should be set aside on the ground that they were exhibited unreasonably and vexatiously, or that they should be struck out on the ground that they were prolix, oppressive, and unnecessary. The Master refused the application, and directed that any objection to the interrogatories should be taken in the answers. On appeal to Day, J., at chambers, he allowed the appeal, and ordered that the interrogatories should be set aside. On appeal to the Divisional Court they affirmed the order of Day, J. (2)

H. D. Greene, Q.C., and *Morten*, for the defendant. Order XXXI., r. 7, does not apply to cases where, as in this case, leave to

(1) It has been deemed unnecessary, for the purposes of this report, to set out the interrogatories which would not be intelligible without also setting out the pleadings, which were lengthy. The points of practice which arose with regard to the interrogatories are, it is thought, rendered sufficiently clear by the arguments, and by the view of them taken in the judgments.

(2) There was some doubt and discussion on the question under which branch of the rule the Divisional Court acted; but they appeared to have considered the interrogatories prolix, oppressive, and unnecessary.

administer interrogatories is necessary, and has been obtained; but only to those cases in which interrogatories are administered without leave. These interrogatories appear to have been set aside by the judge at chambers and the Divisional Court, as being unreasonably and vexatiously exhibited. How can it be held that it was unreasonable or vexatious to interrogate where leave has been given to do so? That would be practically reversing the order giving leave to interrogate, though there has been no appeal against it. The practice in such cases where any of the interrogatories delivered are unreasonable or vexatious is to take objection to them by way of answer under rule 6 of Order XXXI.: see per Field, J., at chambers in *McIlroy* v. *Duncan*. (1)

[KAY, L.J. The order purports, no doubt, to "set aside" the interrogatories; but, if they ought all to be "struck out" under the second branch of the rule as prolix, oppressive, or unnecessary, that is a mere matter of words, and the result would be the same.]

It is contended that the bulk, or, at any rate, part of these interrogatories are quite unobjectionable, and such as the plaintiffs ought to be required to answer. Where that is the case, it is well-settled practice that rule 7 is not applicable; and that the judge at chambers is not to go through the interrogatories to select which are proper and which are not; but the party interrogated must take his objections to the interrogatories in his answer: *Sammons* v. *Bailey*. (2) But, assuming otherwise, then there is no jurisdiction under the rule to set aside or strike out the interrogatories en bloc, as was done here, merely because some of them are open to objection. If the second branch of the rule is applicable in this case, the jurisdiction is only to strike out of the interrogatories such as are prolix, oppressive, unnecessary, or scandalous. *Allhusen* v. *Labouchere* (3), which was decided under the former practice as to striking out interrogatories, shews that the party objecting to interrogatories must object specifically to particular interrogatories which are objectionable. [They also cited *Cawley* v. *Burton*. (4)]

(1) W. N. (1884) 48.
(2) 24 Q. B. D. 727.
(3) 3 Q. B. D. 654.
(4) 32 W. R. 33.

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Horne Payne, Q.C., and *A. G. M. McIntyre*, for the plaintiffs, were not called upon.

LORD ESHER, M.R. In this case the defendant obtained leave to administer interrogatories with regard to his counter-claim and the plaintiffs' reply thereto, and accordingly administered the interrogatories now in question. The judge at chambers either set aside or struck out the whole of these interrogatories. There was an appeal to the Divisional Court, which affirmed the order of the judge at chambers. Thereupon there was an appeal to this Court; and we have to see whether we agree with the conclusion at which the Divisional Court arrived. The Divisional Court assumed to act under Order XXXI., r. 7. The view they took appears to have been as follows. They knew what the nature of the defendant's counter-claim was, and what the reply of the plaintiffs was, and they considered these interrogatories, some twenty in number, each of them including a great many separate questions. They had to consider what burden these interrogatories would impose on the plaintiffs, and whether that burden ought to be imposed upon them. They came to the conclusion that the defendant was seeking by these interrogatories to impose on the plaintiffs the burden of answering a prolix, oppressive, and unnecessary set of interrogatories. They looked at the interrogatories as a whole, and were of opinion that as a whole they were prolix, oppressive, and unnecessary in regard to the litigation in question. So, without inquiring whether there might not be among them some two or three questions which, if asked by themselves, and not drowned in the surrounding prolixity, might have been admissible, they affirmed the order of the judge at chambers. The questions are, whether they had jurisdiction to take the course they did; and, if so, such jurisdiction being discretionary, whether we ought to overrule their exercise of such discretion. Many objections have been taken to what the Divisional Court did; and many questions have been raised with regard to the interpretation of Order XXXI., r. 7. I think that rule deals with two states of circumstances. There may be interrogatories which in form would be unobjectionable, but which, under the circum-

stances of the case, it may be unreasonable or vexatious to exhibit. An illustration was suggested in argument. One or more interrogatories may be put concerning a particular fact which is material, and they may be in a form which, if the particular fact were in dispute, would be unobjectionable—that is to say, such interrogatory or interrogatories may not be prolix or unnecessary in one sense; but, supposing that the fact in question had been admitted on the pleadings or otherwise as between the parties, so that it was obvious that there was no occasion to interrogate with relation to it, then it would be unreasonable and vexatious to do so. The question is raised, under what circumstances such interrogatories may be set aside. One contention put forward was that in such a case one or more interrogatories out of a set cannot be set aside; but the only power is to set aside the whole of the interrogatories where they are unreasonably or vexatiously administered; so that, if ten interrogatories out of twenty were legitimate, and the remaining ten were unreasonably and vexatiously exhibited, it would not be competent to set aside the ten that were unreasonably and vexatiously administered, leaving the others to stand. I cannot think that we ought so to construe the rule, unless there is something in the language which absolutely compels us to do so. The words are, "Any interrogatories may be set aside." The ordinary and grammatical meaning of these words is not that all, but any may be set aside as being unreasonably or vexatiously exhibited. I think the intention is that any which are unreasonably or vexatiously exhibited may be set aside; and, if all of the interrogatories are unreasonably and vexatiously administered, then all may be set aside. Then we come to the second part of the rule, which applies to a different state of things. The same nominative case "any interrogatories," governs the second part of the rule. It provides that "any interrogatories" may be struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous. It appears to me that, as in the case of the first branch of the rule, these words must be construed to mean that all or any of a set of interrogatories may be struck out as prolix, oppressive, unnecessary, or scandalous. If as a whole the interrogatories appear to be prolix, oppressive, or

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unnecessary, I think all may be struck out; if some appear to be so, then those may be struck out. For instance, suppose there are three short, concise, and proper interrogatories, which deal briefly with a matter and ought to be answered, and then there comes one which is expanded in the fashion in which people who draw these interrogatories sometimes expand them, so that it would take pages to answer it. Why should not the three stand, but the one which is prolix or oppressive be struck out? It was argued that, if all were of that oppressive character, they might be struck out; but if only one was, it could not. I can see nothing in the language of the rule which obliges us so to construe it. Again, there might be a set of interrogatories in which the individual questions, or some of them, taken by themselves, might not be objectionable; but suppose a hundred questions were asked as to a simple matter which ought to be dealt with in five, would it not be oppressive and unnecessary to ask such a number of questions, and to require the judge and the other party to go through the whole of them to see whether there were some four or five which, if taken alone, would be unobjectionable? Is it reasonable that the party interrogated should be put to the trouble and expense of going through the whole of the questions to pick out a few which it might be necessary to answer? It was argued that the party interrogated ought to take objection to the questions which might be objectionable in his answer under rule 6. But rule 7 has nothing whatever to do with the answering of the interrogatories. The two rules are wholly distinct. The objection to interrogatories under rule 7 is taken before answers are given. It seems to me a most monstrous result that a party should be entitled to ask, and compel the other party to deal with by way of answers, questions which on the hypothesis it is oppressive to ask, merely because some other questions are asked which are admissible. With regard to the cases cited, I cannot help thinking that in the case of *McIlroy* v. *Duncan* (1), Field, J., must have been applying the new rule on the subject on the supposition that it was identical in effect with the former rule. If he really had in view the terms of the existing rule, then I cannot agree with his decision.

(1) W. N. (1884) 48.

The other case cited was that of *Sammons* v. *Bailey* (1), where Grantham, J., said that "it was in order to obviate the waste of time and expense occasioned by the former practice that the rules were altered," and that "it was not intended that the judge should go through all the interrogatories, and select those parts of interrogatories which he considers objectionable in each case." As I have said, I think that, if the judge, on looking at the interrogatories as a whole, comes to the conclusion that, as a whole, they are prolix, oppressive, and unnecessary, he may disallow the whole; but I do not say that he must do so. Though he may think that, as a whole, they are prolix, oppressive, or unnecessary, still I think that, if he saw that, after striking out half or three-quarters of them, others would remain which by themselves might be properly administered, there is nothing which prevents him from leaving those standing. In the case cited, however, Grantham, J., seems to have thought that the judge must strike out all or none. In that I cannot agree with him. I think that the true construction of the rule is what I have stated. There are different grounds mentioned for the operations referred to in the two parts of the rule respectively, but I do not say that the two portions of the rule may not in some cases overlap each other. Some of the grounds mentioned in one part may exist where the other part is also applicable. It may be oppressive to ask questions which are unreasonably and vexatiously exhibited. Interrogatories that come within the first branch of the rule may be prolix, or oppressive, or unnecessary. For instance, questions may be asked with regard to matters in respect of which they ought not to be asked. In such a case the judge might set aside the interrogatories under the first branch of the rule, or strike them out under the second. The truth is that the rule is made as large as possible to enable the judges to control and prevent the lamentable and growing expense and abuse caused by the practice in regard to interrogatories. In the case before us it was insisted that, some of those interrogatories being proper ones, they at any rate must be answered, and that the Court below could not treat the interrogatories as a whole. I think

(1) 24 Q. B. D. 727.

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that the Court were entitled to look at the interrogatories as a whole, and to see whether, as a whole, they were prolix, oppressive, and unnecessary. They did so, and came to the conclusion that they were. Looking at the interrogatories as a whole, I cannot say that they were wrong; on the contrary, I think that they were right. The case of *Allhusen* v. *Labouchere* (1) seems to me to take the very distinction which I have taken. It was held there, no doubt, that a party who objects to some of a set of interrogatories, on the ground that they are objectionable, must state to which of them he objects; but there is nothing to shew that the judge may not look at the interrogatories as a whole. On the contrary, James, L.J., does say what is equivalent to saying that the judge may look at them as a whole, and if, so looked at, he considers them unreasonably or vexatiously exhibited, or prolix, oppressive, or unnecessary, he may set aside or strike out the whole, though it may possibly be that two or three of them, if they had been administered alone, would have been unobjectionable. For these reasons I think this appeal must be dismissed.

LOPES, L.J. I am of the same opinion. The application now in question was made under Order XXXI., r. 7. Rule 6 of that order has nothing to do with a case of this kind. That rule does not contemplate any application to a judge at all; it only enables a party interrogated to take objection to interrogatories in his answer. The language of rule 7 requires careful consideration. It is not altogether easy to interpret. In the first place, it must be observed that it appears to apply to two states of things. The first part seems to apply to the exhibition of the interrogatories; the second, to the interrogatories themselves when exhibited. The first part seems to deal with the question whether, having regard to the circumstances under which and the stage at which the interrogatories are exhibited, they are reasonable or properly applicable or required; and to leave it to the Court or judge to say whether, under the circumstances, the exhibition of the interrogatories, as distinguished from the interrogatories themselves, is unreasonable

(1) 3 Q. B. D. 654.

and vexatious. The state of things contemplated by the second part of the rule appears to be different, and to have relation to the interrogatories themselves, their nature, character, and effect. The circumstances under which the two parts of the rule respectively come into effect are different. Interrogatories may be set aside when their exhibition is unreasonable or vexatious; they may be struck out when they are prolix, oppressive, unnecessary, or scandalous. The rule commences with the words "any interrogatories." I understand the meaning to be that all or any one or more of the interrogatories exhibited may be set aside on the grounds mentioned in the first part of the rule. Then, when we come to the second part of the rule, the same nominative case applies; and I understand the meaning to be that all or any one or more of the interrogatories may be struck out on the grounds there mentioned. Such being the language of the rule, we have to consider the particular interrogatories now in question. The learned judge at chambers ordered these interrogatories to be set aside or struck out. There was an appeal to the Divisional Court, and they came to the same conclusion. They appear to have thought that the interrogatories as a whole were so prolix, and, having regard to the nature of the case, so unnecessary, that, without looking at them any further, they ought to disallow them all. It was said that they had no jurisdiction to do so. With that I entirely disagree. I think that under the rule the Court had a right to strike out any interrogatories they thought fit, or to determine whether, looking at the interrogatories collectively as a whole, they were within any of the terms of the rule, i.e., were prolix, oppressive, or unnecessary. It was urged that that was not so, where leave to exhibit them had been given. I cannot find any such distinction in the terms of rule 7 or any trace of it. It must be remembered that, when leave to administer interrogatories is obtained, the judge does not know what the nature of the interrogatories administered will be. The leave must be taken to be to administer proper interrogatories. To say that no application can be made under rule 7, where leave to administer interrogatories has been obtained, would be to do away with most of the

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benefit of the rule. The case of *McIlroy* v. *Duncan* (1) has been cited. I quite agree with what the Master of the Rolls has said as to that case. I cannot help thinking that, when Field, J., decided it, he must have had the terms of the old rule in his mind. If he decided it in reference to the terms of the new rule, then I cannot agree with his decision. With regard to what Grantham, J., said in *Sammons* v. *Bailey* (2), I must say that I entirely disagree with it. He seems to have thought that the words of rule 7 only authorized striking out the whole of the interrogatories. I cannot assent to that view. With regard to the case of *Allhusen* v. *Labouchere* (3), there is nothing in that case to shew that the Divisional Court acted wrongly in saying that, looking at the interrogatories as a whole, they came within the terms of the second part of rule 7, and, therefore, should be disallowed.

KAY, L.J. It appears to me that Order XXXI., r. 7, divides itself into two different branches, the first of which deals with the unreasonable or vexatious exhibition of interrogatories; while the second deals with cases where the interrogatories themselves are prolix, oppressive, unnecessary, or scandalous. Under the first branch of the rule interrogatories may be set aside when they are unreasonably or vexatiously exhibited; under the second they may be struck out on the grounds mentioned in this branch of the rule. I agree that under either branch of the rule the meaning is that all or any of the interrogatories may be dealt with; that under the first branch all or any of the interrogatories may be set aside, if unreasonably or vexatiously exhibited; and under the second branch all or any may be struck out, if prolix, oppressive, unnecessary, or scandalous. That this is the true construction of the rule seems very clear, when one looks back to the history of the rules on the subject. The corresponding rule in the original rules under the Judicature Act (Order XXXI., r. 5) was very differently worded; a fresh rule was substituted for that in 1878, upon the

(1) W. N. (1884) 48. (2) 24 Q. B. D. 727.
(3) 3 Q. B. D. 654.

wording of which a difficulty arose. Hence the wording of the present rule has been made wider, in order to give a discretion to set aside or strike out some or all of the interrogatories administered under either branch of the rule. In this case the order of the Divisional Court, as drawn up, purports to set aside the interrogatories, which would seem to indicate that the Court acted on the first branch of the rule. I can well understand how this might be so. The action is brought by brokers against their customer to recover a sum due on the balance of account between them. The defendant counterclaims, seeking to have an account taken from the beginning of the transactions between himself and the plaintiffs. The plaintiffs reply that accounts were delivered to the defendant from time to time, and were settled between the parties. If that were so, and the plaintiffs could maintain their plea of a settlement of account, no taking of an account would be necessary. That question must be decided in the action; but here we have a mass of interrogatories seeking, before it is decided, to go into the accounts from the beginning, when it may be that the accounts are all settled and cannot be reopened. It might well be thought by the Court below that it was an unreasonable and vexatious proceeding to exhibit at this stage of the litigation interrogatories seeking to go into the whole of the accounts between these parties, when the result of the action might be that no such account ought to be taken. But, as I understand, the case was also considered by the Divisional Court under the alternative branch of the rule, and they were of opinion that these interrogatories ought to be struck out, as being, taken as a whole, prolix, oppressive, and unnecessary. It seems to me that it is impossible to look at them without seeing that they are in the main prolix, oppressive, and unnecessary. I agree that the effect of what was said in *Allhusen* v. *Labouchere* (1) is that interrogatories may be in such a form, in respect of their length and character, that, looking at them as a whole, it is impossible to help seeing that they are an abuse of the practice as being prolix or unnecessary. If a general view of them brings the Court to that conclusion, it is no answer to say that there are in the set of interrogatories here

(1) 3 Q. B. D. 654.

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and there some which might be admissible if they stood alone. With regard to the interrogatories now in question, in the view I take of the pleadings, I do not think that they ought to be allowed at the present stage of the action. I must say that, from my experience in chambers in the Chancery Division, I think that there is no matter in which the practice of the Court is more flagrantly abused than in the exhibition of interrogatories at an early stage in actions. I think, therefore, that the Court ought to keep a tight hand over the practice in this respect, and ought not lightly to reverse a decision when it has been held by the Divisional Court that interrogatories have been unreasonably or vexatiously exhibited, or that they are prolix, oppressive, or unnecessary. I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Morley, Sherriff & Co.*
Solicitors for defendant: *Duffield & Bruty.*

E. L.

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Oct. 24, 25.

IN RE THE ONWARD BUILDING SOCIETY

Solicitor — Bill of Costs — Sale of Property by Auction — Commission of Vendor's Solicitor for Sale of Property in Lots—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order, Sched. I.*

The commission payable to a vendor's solicitor, under Sched. I. of the General Order under the Solicitors' Remuneration Act, 1881, "for conducting a sale of property by public auction . . . . when the property is sold," is chargeable upon the total amount realized by the sale, even though the property be sold in lots, and though the lots be held by the vendor under different titles, and be sold to different purchasers.

APPEAL from the county court of Durham, on motion to review taxation.

The Onward Building Society, being in liquidation, the liquidator of the society employed a Mr. Watson, a solicitor, to conduct the sale by auction of certain freehold and leasehold property of the society. The property was sold in three lots, each lot being sold to a different purchaser. Each of the lots was held by the vendors under a different title. Lot 1 was sold for 102*l.* 10*s.*, Lot 2 for 270*l.* 5*s.*, and Lot 3 for 262*l.* 10*s.*, making an aggregate price for the three lots of 635*l.* 5*s.*

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According to Sched. I. of the General Order made under the Solicitors' Remuneration Act, 1881, the scale fee payable to a vendor's solicitor "for conducting a sale of property by public auction, including the conditions of sale, when the property is sold," is, for the first 1000*l.*, 20*s.* per 100*l.*, with a minimum charge of 5*l.* whether a sale is effected or not. And by rule 7 of the rules under that order, "Fractions of 100*l.* under 50*l.* are to be reckoned as 50*l.* Fractions of 100*l.* above 50*l.* are to be reckoned as 100*l.*" By rule 1: "The commission for deducing title and perusing and completing conveyance on a sale by auction is to be chargeable on each lot of property, except that where a property held under the same title is divided into lots for convenience of sale, and the same purchaser buys several such lots and takes one conveyance, and only one abstract is delivered, the commission is to be chargeable on the aggregate prices of the lots." By rule 2: "The commission on an attempted sale by auction in lots is to be chargeable on the aggregate of the reserve prices." But the rules do not expressly state whether, in the event of a successful sale in lots, the commission is to be chargeable on each lot or on the aggregate prices of the lots. The solicitor sent in a bill of costs, in which he charged a commission of 15*l.* for conducting the sale of the above three lots, being the minimum charge of 5*l.* on each lot.

The registrar of the county court in which the liquidation was being conducted allowed upon taxation only the sum of 6*l.* 10*s.*, being the scale fee on the aggregate price of the three lots. The solicitor moved before the county court judge to vary the registrar's certificate of taxation; but the judge confirmed such certificate. The solicitor appealed.

Scott Fox, for the solicitor. Even if the solicitor is not entitled to make a minimum charge of 5*l.* in respect of each lot, he is, at all events, entitled to a commission of 20*s.* per 100*l.* upon each of the three lots, which would amount in all to 7*l.* 10*s.*; for as by rule 7, fractions of 100*l.* under 50*l.* are to be reckoned as 50*l.*, and fractions of 100*l.* above 50*l.* are to be reckoned as 100*l.*, the price of Lot 1 would count as 150*l.*, that of Lot 2 as 300*l.*, and that of Lot 3 also as 300*l.* The lots having been held by the

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vendors under different titles and sold to different purchasers, the commission for deducing title would under rule 1 clearly be chargeable on each lot, and it was not intended to apply a different mode of calculating the commission to the case of conducting a sale by auction.

Dibdin, for the liquidator, was not called upon.

POLLOCK, B. I am of opinion that in this case the county court judge was right, and that the appeal must consequently be dismissed. The official liquidator of the Onward Building Society offered certain real property for sale by auction, and employed a solicitor to conduct the sale. The property, which was sold in three lots, realized in the aggregate 635*l.* 5*s.*, and the question which has arisen is as to the proper charges to be made by the solicitor for conducting such sale. The county court judge held that the three lots were to be treated as one property, and that the solicitor was consequently entitled to a commission of 6*l.* 10*s.*, and no more. That view seems to me to be correct. I think that the intention of the schedule was that if property was put up for sale by auction the solicitor conducting the sale was to be entitled to the scale fee of 20*s.* per 100*l.* on the total amount realized by the sale, irrespective of the question whether the property was sold as a whole or in lots. But then it was argued that rule 1 points to a different conclusion, providing as it does that, except in certain cases—of which the present is not one—the commission for deducing title is to be chargeable on each lot of property, and it was contended that there was no such distinction between the work of deducing title and of conducting a sale by auction as to warrant the application of a different rule to the latter. But in that I do not agree. On the contrary, I think that that rule tells against the solicitor's contention; for in limiting the charge of the commission on each lot to the case of deducing title it suggests that in all other cases the commission is to be charged on the property as a whole on the principle that "Expressio unius est exclusio alterius."

HAWKINS, J. I am of the same opinion. The question which we are called upon in this case to decide is, What is the amount

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of the commission payable to a solicitor for selling on behalf of his client real property by auction, in a case in which the property is sold in lots? The answer to that question depends upon the construction which is to be put upon the language of Sched. I. of the General Order under the Solicitors' Remuneration Act, 1881, and of the rules annexed to that schedule. It is provided by the schedule that the commission payable to a "vendor's solicitor for conducting a sale of property by public auction" shall, "when the property is sold," be 20*s.* per 100*l.* for the first 1000*l.* Then, what are we to understand by the word "property"? Where the land is put up for sale in several lots, is each lot for the purposes of the schedule to be treated as a separate property? I think not. In my judgment, the word "property" means the whole of the land entrusted to the solicitor for sale, or such portion of it as is actually sold; and, consequently, where more than one lot is sold, the solicitor is entitled to commission at the rate of 20*s.* per 100*l.* upon the aggregate of the prices realized by the whole of the lots so sold.

With regard to the lots which are not sold, the schedule provides that, "when the property is not sold" the solicitor shall be entitled to 10*s.* per 100*l.* "on the reserved price"; and, if those words stood by themselves, without any explanation in the rules which follow, I should feel myself driven to the conclusion that in such case the "reserved price" would mean the reserved price of each lot, for when some of the lots have been sold there is no price reserved in respect of the aggregate of the unsold lots, though there is a price reserved in respect of each of the unsold lots taken severally.

I now pass to the consideration of the rules. By r. 1: "The commission for deducing title and perusing and completing conveyance on a sale by auction is to be chargeable on each lot of property, except that where a property held under the same title is divided into lots for convenience of sale, and the same purchaser buys several such lots and takes one conveyance, and only one abstract is delivered, the commission is chargeable upon the aggregate prices of the lots." And that, I think, is reasonable enough; for, save in the cases falling within the exception, the work of the solicitor in respect of deducing title and completing

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conveyance is multiplied by the number of the lots: he may have to deduce a separate title in respect of each lot, and even if they are held under the same title he has the trouble of delivering a separate abstract and preparing a separate conveyance for each purchaser. It is otherwise, however, with the conduct of a sale by auction, which is practically one operation whether the property is offered as a whole or in lots. The division of the property into lots does not materially increase the trouble of conducting the auction. Then by r. 2: "The commission on an attempted sale by auction in lots is to be chargeable on the aggregate of the reserved prices." That provision, I think, is applicable as well to a case where some of the lots are sold as to one in which none are sold. That rule, therefore, negatives the view which without it, as I have already said, I should have taken of the meaning of the words "reserved price" in the schedule. And the effect of the schedule, read by the light of that rule, is that where property is offered in lots, and a portion only is sold, the solicitor is entitled in respect of the unsold portion to 10*s.* per 100*l.*, not on the reserved price of each lot, but on the aggregate of the reserved prices of the lots. The judgment of the county court judge must be affirmed.

Appeal dismissed.

Solicitors for solicitor: *Iliffes, Henley, & Sweet.*
Solicitors for liquidator: *Bridges, Sawtell & Co.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
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Oct. 28.

IN RE WATSON.
EX PARTE JOHNSTON.
JOHNSTON *v.* WATSON.

Judgment—Irish Judgment registered in England—Enforcement by English Court—Judgment Summons—"Execution"—Judgments Extension Act, 1868 (31 & 32 *Vict. c.* 54), *ss.* 1, 4—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *ss.* 4, 5.

The Judgments Extension Act, 1868, provides by s. 1 for the registration of Irish judgments in England, and that from the date of registration such judgments shall be of the same force and effect, and all proceedings may be had and taken on them, as if they had been originally obtained or entered up on the date of registration in the Court in which they are so registered. By s. 4 the English Court is to have and exercise the same control and jurisdiction over any judgment registered under the Act in that Court as it "now" has and exercises over any judgment in its own Court; "but in so far only as relates to execution under this Act":—

Held, that the procedure by judgment summons under the Debtors Act, 1869, is not "execution" of the judgment debt within the meaning of s. 4 of the Judgments Extension Act, 1868, and that the English Court has no jurisdiction to issue a judgment summons for the purpose of enforcing a registered Irish judgment.

APPEAL by J. M. Johnston and R. S. Johnston from the dismissal by Pollock, B., of a judgment summons issued by the appellants against E. H. Watson.

On June 23, 1892, the appellants obtained a judgment in an action against Watson in the High Court of Justice in Ireland for 137*l.* 6*s.* 4*d.*, debt and costs. The judgment was on July 19, 1892, registered in England under the provisions of the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54). The costs of the registration were taxed and allowed at 1*l.* 16*s.* Watson failed to satisfy the judgment. On July 27, 1892, the appellants issued a judgment summons in the High Court in England calling on Watson to appear before the judge sitting in bankruptcy, to be examined on oath by the Court touching the means he had, or had had since the date of the judgment, to pay the sum in payment of which he had made default, and also to shew cause why he should not be committed to prison for such default. Pollock, B., dismissed the summons, on the ground that,

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under the Judgments Extension Act, 1868, the English Court had no jurisdiction over an Irish judgment, except as regards "execution" in the strict sense of the word.

Herbert Reed, Q.C., and *W. Clarke Hall*, for the appellants. The effect of the registration of an Irish judgment under the Judgments Extension Act, 1868, is to place it in the same position as an English judgment, and to give the English Court the same power of enforcing it as it has in the case of an English judgment. The words of s. 1 (1) of the Act are very wide,

By s. 1: "Where judgment shall hereafter be obtained in any of the Courts of Queen's Bench, Common Pleas, or Exchequer at Dublin . . . . for any debt, damages, or costs, on production to . . . . the senior master of the Court of Common Pleas at Westminster, where such judgment shall have been obtained in any of the said Courts in Ireland, of a certificate of such judgment in one of the forms contained in the schedule hereto annexed, as the case may be, purporting to be signed by the proper officer of the Court where such judgment has been obtained, such certificate shall be registered by such master . . . , and shall from the date of such registration be of the same force and effect, and all proceedings shall and may be had and taken on such certificate, as if the judgment of which it is a certificate had been a judgment originally obtained on the date of such registration as aforesaid in the Court in which it is so registered . . . .: Provided always, that no certificate of any such judgment shall be registered as aforesaid more than twelve months after the date of such judgment, unless application shall have been first made to and leave obtained from the Court or a judge of the Court in which it is sought so to register such certificate."

Sect. 4: "The Court of Common Pleas at Westminster . . . . shall have and exercise the same control and jurisdiction over any judgment . . . . and over any certificate of such judgment . . . . registered under this Act in such Court as it now has and exercises . . . . over any judgment . . . . in its own Court, but in so far only as relates to execution under this Act."

By the Debtors Act, 1869, s. 4: "With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money.

"There shall be excepted from the operation of the above enactment (inter alia)—

(6.) "Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made:

"Provided, first, that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year; and, secondly, that nothing in this section shall alter the effect of any judgment or order of any Court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money.",

Sect. 5: "Subject to the provisions hereinafter mentioned, and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in

and "execution" in s. 4 includes any legal mode of enforcing a judgment, and is not limited to a fi. fa. It includes the mode of enforcing a judgment by means of a judgment summons under s. 5 of the Debtors Act, 1869: *Ferguson* v. *Ferguson*. (1)

[LOPES, L.J., referred to *Stonor* v. *Fowle*. (2)]

Channell Q.C., and *Beddall*, for the judgment debtor, were not heard.

LORD ESHER, M.R. It has been truly said that the case depends entirely upon whether the Judgments Extension Act applies. The appellants contend that the words of s. 1 apply to the present case. It may be that, if s. 1 had stood alone, it would have been large enough to cover this case, though I think that is doubtful, for the Debtors Act, 1869, under which the judgment summons was issued, was not in existence when the Judgments Extension Act was passed. But it is unnecessary to decide that point, for in order to construe the Act properly we must read the whole of it. There are very general words in s. 1; but the subsequent section, s. 4, limits the whole of s. 1, and shews that the general words of that section are not to be read in their largest sense. Sect. 4 says that the English Court is to exercise over a registered Irish judgment the same jurisdiction as it has over an English judgment, "but in so far only as relates to execution under this Act." The appellants have endeavoured to get rid of the words "under this Act." But, even if those words are omitted, the power of the Court is limited to "execution." Is the power which is conferred by s. 5 of the Debtors Act, 1869, of committing a defaulting debtor to prison, "execution"? It has been expressly decided in *Stonor* v. *Fowle* (2) that it is not,

payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court.

"Provided (1.) That the jurisdiction by this section given of committing a person to prison shall, in the case of any Court other than the superior Courts of law and equity, be exercised only subject to" certain restrictions (inter alia).

"No imprisonment under this section shall operate as a satisfaction of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place."

(1) Law Rep. 10 Ch. 661.

(2) 13 App. Cas. 20.

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and the point hardly needed authority. Moreover, s. 5 of the Debtors Act expressly provides that, when the creditor has done all that he can to enforce the remedies given to him by that section, his right to execution on the judgment remains untouched. It is as clear as can well be that the power of committing a debtor, or of ordering him to pay by instalments, is not "execution," and, if so, the Judgments Extension Act does not authorize the Court to employ that power for the purpose of enforcing an Irish judgment registered in England.

LOPES, L.J. The judgment is an Irish one, and the judgment creditor seeks to avail himself of the Judgments Extension Act, 1868, and to make use of s. 5 of the Debtors Act, 1869, just as if the judgment were an English one. The terms of s. 1 of the Act of 1868 are, no doubt, wide, and Mr. Reed relies on the words 'in all proceedings." But it must be borne in mind that at that time the Debtors Act of 1869 had not been passed, and, if there were nothing more in the Act of 1868, I should find it difficult to hold that it applied to proceedings under the Debtors Act. But a much stronger ground for holding that it does not is to be found in s. 4 of the Act of 1868, which in terms provides that the jurisdiction of the English Court is to be exercised "so far only as relates to execution under this Act." It seems to me impossible to say that the procedure by judgment summons under the Debtors Act is "execution under this Act," that is, under the Act of 1868. Indeed, I think it is not "execution" at all. It was decided in *Stonor* v. *Fowle* (1) that such a proceeding is in its nature punitive, and is not a mere mode of enforcing payment of the debt. It cannot, therefore, be "execution." Then s. 5 of the Debtors Act says, that "No imprisonment under this section shall operate as a satisfaction of any debt, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place." It is clear, therefore, that if proceedings are taken under the Debtors Act, and an order for committal is made, and the debtor is imprisoned for six weeks, the right of "execution"

(1) 13 App. Cas. 20.

still remains, and a fi. fa. can issue upon the judgment, if the debtor has any goods. This makes it quite plain that this proceeding under the Debtors Act is not "execution" under the Act of 1868.

KAY, L.J. I entirely agree in the conclusion of my learned colleagues, as well as in the reasons which they have given for it. I will only add that s. 5 of the Debtors Act speaks of the power of committal as a new jurisdiction. It provides that "the jurisdiction *by this section given* of committing a person to prison shall be exercised only subject to" certain restrictions, and then follows the provision which Lopes, L.J., has read, that the new remedy given is not to interfere with the creditor's right of execution. The Act of 1868 gives the English Courts power over Irish judgments "so far only as relates to execution under this Act." It would be an extraordinary construction of these words to hold that they include the power of committing a debtor to prison which is conferred by a later Act, in which Act itself that power is sharply contrasted with "execution."

Appeal dismissed.

Solicitors: *Thomas, Metcalfe, & Sharpe; H. D. Booth.*

W. L. C.

JAY *v.* JOHNSTONE.

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Nov. 2.

Limitations, Statute of—"*Judgment*"—3 & 4 *Wm.* 4, *c.* 27, *s.* 40—3 & 4 *Wm.* 4, *c.* 42, *s.* 3—27 & 28 *Vict. c.* 112, *s.* 1—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Order* XVII., *r.* 4.

By s. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57): "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same."

Held, that the expression "judgment" in s. 8 of the Real Property Limitation Act, 1874, refers to judgments generally and is not restricted to judgments which operate as charges upon land.

Hebblethwaite v. *Peever* ([1892] 1 Q. B. 124) and *Watson* v. *Birch* (15 Sim. 523) followed.

APPEAL from chambers.

On August 9th, 1878, the plaintiff recovered judgment against

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the defendant, which was still unsatisfied. On August 10, 1892, the legal personal representatives of the plaintiff, who died November 5, 1881, applied under Order XVII., r. 4, that proceedings upon the judgment might be carried on between them and the legal personal representative of the defendant, who died on January 5, 1891, and also for leave to issue execution upon the judgment. The master and judge at chambers refused the application on the ground that the remedy upon the judgment was barred by s. 8 of the Real Property Limitation Act, 1874. (1) The representatives of the plaintiff appealed.

Montague Lush, for the appellants. Sect. 8 of the Real Property Limitation Act, 1874, has no application to this case. It only affects judgments which are a charge on land, and does not apply to personal judgments. No doubt the provision in 3 & 4 Wm. 4, c. 27, s. 40, which was in similar terms to those used in s. 8 of the Real Property Limitation Act, 1874, has been held to apply to personal judgments: *Watson* v. *Birch* (2); but now, by the 27 & 28 Vict. c. 112, s. 1, no judgment shall affect any land until such land has been actually delivered in execution in pursuance of such judgment. Until that statute a judgment when obtained was always a charge on the land of the debtor; but the effect of that statute has been to exclude judgments from the operation of the Real Property Limitation Act, 1874.

[LORD COLERIDGE, C.J. Then do you contend that there is now no period of limitation in respect of actions on judgments?]

They come within 3 & 4 Wm. 4, c. 42, s. 3, which provides that actions of debt on "any bond or other specialty" must be brought within twenty years after the cause of such actions.

(1) By the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent."

(2) 15 Sim. 523.

"Specialty" includes judgment. *Hebblethwaite* v. *Peever* (1) was wrongly decided and cannot be supported.

Finlay, Q.C., and *H. T. Eve*, for the respondent. It is not competent to the Court to accede to an application to continue proceedings under Order XVII., r. 4, after final judgment has been signed: *Arnison* v. *Smith*. (2) The limitation imposed by the Real Property Limitation Act, 1874, s. 8, is not confined to actions for the recovery of money charged on land, but applies also to the personal remedy on the covenant in a mortgage deed: *Sutton* v. *Sutton*. (3) It is a well-established principle that where an expression in an Act of Parliament has received a judicial interpretation it must be assumed that when that expression is used in a subsequent Act the legislature have used it in the sense in which it has so been interpreted: *Greaves* v. *Tofield*. (4) "Judgment" as used in s. 40 of 3 & 4 Wm. 4, c. 27, has been interpreted in *Watson* v. *Birch* (5), as including personal judgments. When, therefore, that section was re-enacted by s. 8 of the Real Property Limitation Act, 1874, the word "judgment" must be taken to have been used by the legislature in the sense in which it was interpreted in that decision.

If proceedings on judgments are not affected by s. 8 of the Act of 1874, there is no period of limitation with regard to them. The 3 & 4 Wm. 4, c. 27, s. 40, expressly provided for actions on judgments, and it cannot be supposed that the 3 & 4 Wm. 4, c. 42, passed in the same year, intended to provide for them under the words "or other specialty."

Montague Lush, replied.

LORD COLERIDGE, C.J. In this case, in spite of a very able argument, I can see no answer to the short judgment which I am about to deliver. It appears to me to be founded on principle, to be supported by authority, and to be conclusive. The Act of 1874, by s. 8, limits the time for bringing actions to recover any sum of money secured by any judgment to twelve years. It is a re-enactment in terms of the 40th section of 3 & 4 Wm. 4, c. 27,

(1) [1892] 1 Q. B. 124.
(2) 40 Ch. D. 567.
(3) 22 Ch. D. 511.
(4) 14 Ch. D. 563.
(5) 15 Sim. 523.

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which fixed the period of limitation at twenty years, and which is repealed by s. 9 of the Act of 1874. There is a well-known principle of construction, sanctioned, if sanction were necessary, by the decision of the Court of Appeal in *Greaves* v. *Tofield* (1), that where the legislature uses in an Act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted. The word "judgment," as used in s. 40 of the Act of Wm. 4, received judicial interpretation in the case of *Watson* v. *Birch*. (2) It must, therefore, be taken that it was used by the legislature in the Act of 1874 in the sense in which it was interpreted by Shadwell, V.C., in that case. He decided that the word "judgment" in the Act, applied to a judgment which is sought to be enforced against personal estate as well as to a judgment which is sought to be enforced against the land of the debtor.

That is, I think, conclusive; but it is contended that the Act 27 & 28 Vict. c. 112, which was intermediate between the Act of Wm. 4 and the Act of 1874, has altered the meaning of the word "judgment" and caused it no longer to include charges on land, and it is said that the effect of that Act is therefore to repeal the clause of the Act of Wm. 4 referring to judgments. The result, I confess, seems to me absurd, because if that were so, there would be no period of limitation at all with respect to actions on personal judgments. The Act 27 & 28 Vict. c. 112, had nothing whatever to do with the limitations of actions and did not affect or assume to affect the Statutes of Limitation. It cannot, therefore, have any effect on s. 40 of 3 & 4 Wm. 4, c. 27. We have here a subsequent Act using the same word which has been used in a previous Act and which has received judicial interpretation. We are bound on principle to say that the word must be taken to be used in the sense in which it was judicially interpreted. That being so, the period of limitation for actions on personal judgments is twelve years, and the contention of the appellant fails. We have the advantage not only of deciding this case on a well-known and well-established principle of law, but also we have the assistance of a luminous and careful judg-

(1) 14 Ch. D. 563. (2) 15 Sim. 523.

ment of my brother Collins in *Hebblethwaite* v. *Peever*. (1) Our decision, therefore, is in accordance both with the principles of construction and with two decided cases.

WILLS, J. I am of the same opinion. The case seemed to be one of considerable perplexity; but I think that when it comes to be threshed out the point is a fairly simple one. If it had not been for 27 & 28 Vict. c. 112, there would have been no tenable argument for the appellants. Matters then would have stood thus: The word "judgment," as used in 3 & 4 Wm. 4, c. 27, s. 40, has received a judicial construction which is fatal to this contention. The Act of 1874 simply alters the period of limitation from twenty years to twelve years, and otherwise retains and re-enacts the identical language of s. 40 of the earlier Act. If there were nothing else it would be absolutely conclusive that the judicial interpretation given by Shadwell, V.C., in *Watson* v. *Birch* (2) had been adopted by Parliament in the later Act.

But the argument for the appellant is that 27 & 28 Vict. c. 112, repealed so much of 3 & 4 Wm. 4, c. 27, s. 40, as fixed a period of twenty years in respect of judgments, unless under the provisions of 27 & 28 Vict. c. 112, they should become charges upon land. That seems to me too violent a conclusion. It is not likely that Parliament would make such an important change without expressly saying so. I do not think that 27 & 28 Vict. c. 112, did more than it professed to do. It enacted that in future judgments were not to affect land until such land had been actually delivered in execution, except as provided by s. 4.

No doubt until the passing of that Act a personal judgment had been a charge on land, and it was decided in *Watson* v. *Birch* (2) that such a judgment fell within s. 40 of 3 & 4 Wm. 4, c. 27, and that the period of limitation in respect of it was twenty years. The result of Mr. Lush's argument, however, would be, I think, that personal judgments are now left uncovered by any period of limitation at all. That seems to me an extraordinary construction to put on the Acts of Parliament. He contends, no

(1) [1892] 1 Q. B. 124. (2) 15 Sim. 523.

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doubt, that they are covered by the words "or other specialty," in 3 & 4 Wm. 4, c. 42, s. 3, and that the period of limitation with regard to them is therefore twenty years. Possibly, if 3 & 4 Wm. 4, c. 42, s. 3, stood by itself that would be so, and the words "or other specialty" might be held to include personal judgments. But the Act does not stand alone. In the very same year, and but little before c. 42, another Act of Parliament was passed which expressly dealt with "judgments." Having just done this, it cannot be supposed that Parliament intended in the later Act of the same year to include judgments under the term "or other specialty." Therefore, as I have said, if 27 & 28 Vict. c. 112, did repeal the provision in 3 & 4 Wm. 4, c. 27, s. 40, as to judgments, there would be no period of limitation at all with respect to personal judgments. I cannot conceive, in the absence of express enactment, that Parliament could intend to go back on itself and to take away altogether the existing limitation to actions on judgments. To do so would be entirely contrary to the tendency of modern legislation. In my opinion the 27 & 28 Vict. c. 112, had no such effect on 3 & 4 Wm. 4, c. 27, s. 40, as is suggested. I desire to subscribe to the reasons given by my Lord, and I agree that this appeal must fail.

Appeal dismissed.

Solicitor for appellants: *H. J. Comyns.*
Solicitors for respondent: *Eardley-Holt, Hulbert, & Hubbard.*

A. P. P. K.

LEPLA *v.* ROGERS.

1892
May 14, 16;
June 25;
Oct. 31.

Landlord and Tenant—Breach of Covenant not to Assign without Licence—Measure of Damages.

A lease contained a covenant that the lessee should not assign or sublet the premises, or any part of them, without the consent in writing of the lessor, his executors, administrators, or assigns; but that such consent should not be unreasonably or capriciously withheld to a responsible assignee or sub-tenant. The lessee, without applying for the consent of the lessor, sublet the premises to a person who intended, as he knew, to use them, and who did, in fact, use them as a turpentine distillery. The premises having been burnt down by a fire arising from the use of the premises for the business for which they were taken, an action was brought by the lessor for breach of covenant:—

Held, that the loss caused by the fire was the natural result of the breach of covenant, and was, therefore, recoverable as damages in the action.

ACTION tried before Hawkins, J., without a jury.

The facts and arguments are fully set out in the judgment.

Tindal Atkinson, Q.C., and *C. M. Atkinson*, for the plaintiff.

Jelf, Q.C., and *Johnston Watson*, for the defendant.

Cur. adv. vult.

1892. Oct. 31. HAWKINS, J., read the following judgment. This action was tried before me on the 14th and 16th of May last. After hearing the evidence in the case it was arranged between the learned counsel that I should hear their arguments on a future day and direct how judgment should be entered. I accordingly heard the arguments on June 25, and have now to announce my views.

The action was brought by the plaintiff, Mr. Lepla, against the defendant, Mr. Rogers, for breaches of two covenants hereafter set out, contained in a lease of certain premises in Syren Street, Kirkdale, Liverpool, granted by one George Bell Cowl to the defendant on January 31, 1889, one of such covenants binding the lessor not to use the premises for any business which might be a nuisance or detrimental to surrounding occupiers; the other being a covenant not to assign or sublet without the consent of the lessor. The plaintiff's title to sue on these covenants was not disputed. As to the first of them it was admitted

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that no breach was proved as to it, therefore my judgment must be for the defendant. As to the second of the covenants it was not disputed that there had been a breach, but Mr. Jelf, for the defendant, contended that nominal damages only could be awarded by reason that the substantial damage claimed was too remote. To cover such nominal damages 40*s.* has been paid into Court. The question raised is an important one. The facts which have given rise to it are as follows:—

On February 1, 1879, the Earl of Derby leased to Mr. John Augustine Graham certain premises containing 1367 superficial square yards with buildings thereon situate in Kirkdale, bounded on the north by Syren Street, and on the south and west by the Leeds and Liverpool Canal Co.'s land and wharf, for a term of seventy-five years from March 25, 1875. On March 25, 1882, Graham assigned all his interest in the lease and premises to George Bell Cowl. By a lease dated January 31, 1889, Cowl demised to the defendant, William Edgar Rogers, the whole of the aforesaid premises, together with a piece of land adjoining those premises on the west side and connecting it with the Leeds and Liverpool Canal, for a term of three years, from January 1, 1889, as regards the land comprised in the Earl of Derby's lease, and as regards the additional piece of land, upon a yearly tenancy from January 1, 1889, subject to six months' notice to quit.

In that lease, inter alia, are the following covenants: "And it is hereby mutually agreed between the parties hereto that no business which is detrimental or a nuisance to surrounding occupiers shall be carried on, in, or upon the said premises, or any part thereof; also, that the said William Edgar Rogers shall not be at liberty to assign or sublet the said premises, or any part thereof, without the consent in writing of the said George Bell Cowl, his executors, administrators, or assigns, but such consent shall not be withheld capriciously or unreasonably to a responsible assignee or sub-tenant."

By indentures of mortgage and further charge dated respectively March 27 and June 20, 1884, between Cowl of the one part, and Robert Hull of the other part, the premises demised by the Earl of Derby to Cowl were by him assigned to Hull, his

executors, administrators, and assigns, for the whole of the unexpired term of seventy-five years (except the last day thereof), to secure to Hull the repayment with interest of certain moneys advanced by him. Hull died, having by his will, which was proved on January 10, 1889, appointed William Lepla (the plaintiff) his sole executor. On March 15, 1889, the mortgage money with arrears of interest being still due, Lepla gave written notice to and required Rogers to pay the rent of the premises to him, Lepla, and not to Cowl. On August 19, 1889, Rogers, with the written consent of the Earl of Derby and Cowl, granted an underlease of all the premises demised to him by Cowl to the Eureka Manufacturing Company, Limited, as regards the premises comprised in Lord Derby's lease for the residue of the term of three years except the last day thereof, and as to the rest of the premises for one year from January 1st, 1889, and afterwards from year to year. Rogers was managing director of the Eureka Company.

The Eureka Company entered upon the premises, and used them for a short time as offices, oil stores, a fitting-shop, smithy and warehouse; but they went into liquidation and ceased to occupy before May 15, 1890, for in a policy dated that day, effected on them by Lepla against fire, in the Royal Insurance Office, the premises are described as empty. A Mr. Boult also occupied a portion of the premises as an oil merchant down to the month of December, 1891. But neither the Eureka Company nor Boult ever refined or distilled oil or turpentine on the premises. In the autumn of 1890 Mr. Simon Judd, the liquidator of the Eureka Company, surrendered to Rogers his interest, as such liquidator, in the premises. Rogers thereupon employed Judd to find another tenant for the premises, and shortly afterwards Mr. Mathew Mark Lawson, a Canadian turpentine importer and distiller, entered into negotiation with him, as agent for Rogers, for a tenancy of a portion of the premises. In the course of these negotiations Judd asked Lawson the nature of his business. There was a conflict of testimony as to the latter's reply, Judd stating that it was simply to the effect that he was an importer of Canadian turpentine, which was racked off from one cask to another and sold by him as an

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importer and dealer. Lawson, on the other hand, swore that he had expressly told Judd that he required the premises for the purpose of carrying on the business of oil-boiling and refining and turpentine distilling. Without wishing to impute to Mr. Judd wilful misrepresentation, I have, after very careful consideration, come to the conclusion that Mr. Lawson's version is the correct one, and I find accordingly that Mr. Judd, whose agency for Rogers is clear, was, before the sublease, fully informed of the purposes for which the premises were required, being those for which they were afterwards used. As the result of these negotiations, on January 16, 1891, by agreement between Rogers and Lawson, the portion of the premises lying nearest to the Canal was let to Lawson upon a yearly tenancy as from December 29, 1890. Within a day or two afterwards the borough surveyor of Liverpool intimated to Lawson that he would not be allowed to store any quantity of turpentine in the premises he had taken for manufacturing, because it was of a dangerous nature. This was communicated to Judd, and led to the making of a further agreement dated January 21, 1891, between Rogers and Lawson, for the letting by the former to the latter of the remainder of the premises lying between those let on January 16 and Syren Street, on a yearly tenancy.

No consent was ever applied for or given by either the Earl of Derby, Cowl, or Lepla, in respect of these sublettings of January 16 and 21, 1891, or either of them.

Under those agreements of January 16 and 21, 1891, Lawson, about the month of February, entered upon the premises and carried on his aforesaid business until May 29 following, when, about midday, a fire suddenly broke out in the manufacturing portion of the premises, causing damage to the demised premises to the agreed amount of 150*l.*

The fire was caused by some spirits of turpentine, in its passage through a certain pipe from the still to the storage tank, escaping through a leakage in the pipes at a spot where it passed over a boiler and fireplace in the manufacturing department, whereby it became ignited. This leakage, according to Lawson's statement, was due to bad workmanship on the part of the engineers (the Liverpool Condenser Company), who supplied and brought

the pipes upon the premises. I am not, however, at all satisfied that such was the case, for Lawson had never tested the pipes, and they had been in use for two or three months without any defect being noticed, which could hardly have happened if they had been originally supplied in a leaky condition. Anyhow, I find as a fact that the fire arose from the use of the premises for the business for which they were taken. It is common knowledge that such a business is a highly dangerous one, and before me evidence was given by the architect and surveyor of the Royal Insurance Company that so great is the risk of fire that premises used for oil refining or turpentine distilling are practically regarded as uninsurable. That there was a breach of the covenant not to sublet without consent there can be no doubt, and I think there is equally little doubt that had such consent been asked to a sublease for the purpose aforesaid, the landlord would have been fully justified in refusing, and would have refused it, and nobody could have said such refusal was capricious or unreasonable; the more especially when, as in the case of the lease before me, the covenant by the tenant to repair excepts damage by fire, and no covenant to insure is contained in it.

Very little assistance is to be found in the books to guide as to the assessment of damages for breaches of such covenants as that now under consideration. The general principles governing the assessment of damages for breaches of contract are, however, clearly, with slight qualification, enunciated in *Hadley* v. *Baxendale*. (1)

In delivering the considered judgment of the Court in that case Alderson, B., said: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

The qualification I have referred to will be found in the

(1) 9 Ex. 341.

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observations of Cotton, L.J., in delivering his judgment in *McMahon* v. *Field*. (1) "In my opinion," said the Lord Justice, "the parties never contemplate a breach, and the rule should rather be that the damage recoverable is such as is the natural and probable result of the breach of contract." In Story on Agency, s. 217 c., it is said, "the loss or damage need not be directly or immediately caused by the act which is done or which is omitted to be done. It will be sufficient if it be fairly attributable to it as a natural result or a just consequence. But it will not be sufficient if it be merely a remote consequence or an accidental mischief."

Simple and plain as the guiding principles appear to be, it has not always been found easy to apply them to the infinite variety of circumstances under which contracts have been made and broken. Numerous reported cases, most of which will be found collected in Mayne on Damages and in the notes to *Vicars* v. *Wilcocks* (2), testify to this.

For the bare breach of a covenant not to assign or sublet without consent, a lessor, if he thinks fit so to do, is clearly entitled to sue for and recover nominal damages, even though the person, to whom the assignment or sublease is made, be one to whom no lessor could reasonably object; for although a capricious or unreasonable refusal of consent might justify the lessee in making an assignment or sublease notwithstanding such refusal (see *Treloar* v. *Bigge* (3)), still the right of the lessee so to act does not arise until the consent of the lessor has been asked for and withheld. In applying the principles which must determine whether substantial damages are recoverable in a case like the present, let us for a moment consider what must be deemed to be in the contemplation of any reasonable lessor and lessee in entering into such a covenant as that before us. Surely the lessor must be taken to intend, and the lessee to know that he so intends, to protect himself as far as possible against loss or damage which might result from an objectionable assignee or sub-tenant, or an objectionable use being made of his property, whether such objection be on account of the inability of the

(1) 7 Q. B. D. 591, at p. 597. (2) 2 Sm. L. C., 9th ed. p. 577.
(3) Law Rep. 9 Ex. 151.

proposed assignee or sub-lessee to pay the rent and fulfil the other covenants contained in the lease, or on account of the probability that he will so use the demised premises as to expose them to extraordinary peril and danger. Assuming such to be the case, and that the lessee deliberately, in defiance of his covenant, sublets them without his lessor's consent to a person in order that upon them such person may carry on a business of a highly dangerous character, and afterwards, in the course of, and as one of the risks thereof, an explosion or fire occurs destructive to the premises, could it be seriously doubted that such damage was within the contemplation of the parties when the covenant was made?

I proceed now to consider whether the damage sought to be recovered can fairly and reasonably be treated as arising naturally, that is, according to the usual course of things, from the breach of the defendant's covenant. I think it may. It is not, in my opinion, essential to prove that the damage *must inevitably follow such breach*; it is sufficient to shew that it was a probable and not unlikely result. I do not wish to be understood as saying that any and every damage occasioned to premises by an assignee or sub-tenant let into possession in defiance of a covenant not to assign or sublet, could be saddled upon the person guilty of such breach. Take, for instance, the case of a sublease, without consent, of a house to a highly respectable and responsible tenant for bonâ fide occupation as a dwelling-house; if through some carelessness on the part of such tenant or his servant, the house were accidentally set on fire and destroyed, it could hardly be contended that the breach of the covenant was the proximate cause of the fire; for, according to the usual course of things, such misfortunes are not in the contemplation of anybody, and do not happen as the result of the ordinary occupation of a dwelling-house; and it would have been a capricious and unreasonable thing for a landlord to refuse his consent to a sublease upon the mere ground that the sub-tenant or some one of his servants, possibly might, in the future, accidentally set fire to the house. I will not say that the person guilty of the breach might not be responsible if, when he committed it, he knew that the sub-tenant so about to be let in was a

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recklessly negligent person, who had previously by his recklessness caused damage by fire, or otherwise, to houses in his occupation. Again, if a house, let to an unobjectionable sub-tenant for the purpose of a mere dwelling-house, were afterwards damaged by fire caused by the sub-tenant using it for a dangerous purpose, I should hesitate to cast liability for substantial damages upon the person who so sublet without asking his lessor's consent; for in such a case, inasmuch as a refusal of consent to the sublease would, at the time it was made, have been unreasonable and capricious, the lessee would have been entitled to sublet as though no such covenant existed: see *Treloar* v. *Bigge*. (1)

The present case, however, is very different; the premises are sublet to Lawson for the express and avowed purpose of enabling him to carry on upon them a business highly dangerous, and in knowingly so subletting the defendant must have known that he was seriously imperilling the safety of the premises, and exposing his lessor to risk of injury.

I do not stop to inquire for what hitherto unexplained reason neither the defendant nor Judd made any application to the plaintiff for his consent to the sublease to Lawson. It may possibly be that they felt that, as a prudent man, he would have refused it, and in their anxiety to speedily find a new tenant in the place of the liquidating Eureka Company they preferred to risk the consequences of the breach of covenant which undoubtedly was committed.

Under all the circumstances, I look upon the fire and the consequent damage as the natural result of the subletting for the hazardous purposes I have mentioned, and such subletting as the proximate cause of the fire; and I find the statement of claim substantially proved by the evidence before me.

No authority directly bearing upon this particular question was cited in the argument before me. *Williams* v. *Earle* (2) is the only one in which the question of damages for breach of covenant not to assign has been discussed; but that case throws no real light on the general principle involved in this case. *Lilley* v. *Doubleday* (3) and *McMahon* v. *Field* (4) may, however,

(1) Law Rep. 9 Ex. 151.
(2) Law Rep. 3 Q. B. 739.
(3) 7 Q. B. D. 510.
(4) 7 Q. B. D. 591.

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be usefully referred to as illustrations of the principle I have endeavoured to apply to the circumstances with which I have to deal. In my opinion, the plaintiff is entitled to the damages claimed by him, and I accordingly give judgment for him for the sum of 150*l*. As to costs, I think the plaintiff ought to have the general costs of the cause.

Judgment for the plaintiff.

Solicitors for plaintiff: *Bridges, Sawtell, Heywood, Ram, & Dibdin, for Bendall, Newmarket.*

Solicitors for defendant: *C. P. Pritchard & Marshall, for Walter Codd & Co., Liverpool.*

A. P. P. K.

GOSLING *v.* WOOLF.

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Nov. 3.

Landlord and Tenant—Lease—Assignment of Underlease—Grant of Underlease—Title—Right to call for Lease of Assignor or Lessor—"Leasehold Reversion"—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), *s.* 3, *sub-s.* 1; *s.* 13, *sub-s.* 1.

Under a contract to sell and assign a term of years derived out of a leasehold interest in land, or to grant a lease for a term of years to be derived out of a leasehold interest with a leasehold reversion, the intended assign or lessee has the right to call for the lease under which the intended assignor or lessor holds.

APPEAL by the defendant from the decision of the deputy judge of the City of London Court.

The plaintiff agreed to purchase an underlease from the defendant, and paid a deposit of 10*l*. The defendant refused to furnish any abstract of title, whereupon the plaintiff brought this action to recover the deposit which he had paid.

Judgment was given for the plaintiff.

Megone, for the defendant, in support of the appeal. The effect of s. 3, sub-s. 1, and s. 13, sub-s. 1, of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), is that under a contract to sell and assign a term of years derived out of a leasehold interest in land, and also on a contract to grant a lease for a term of years to be derived out of a leasehold interest

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with a leasehold reversion, the intended assign or lessee has no right to call for the lease under which the intended assignor or lessor holds.

[POLLOCK, B. Does not "leasehold reversion" in s. 13, sub-s. 1, mean the reversion to the lease out of which the sublease is to be granted?]

The true construction is that it means the reversion to the underlease. The provisions of the Conveyancing Act correspond to the 1st rule in s. 2 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), and the result is that, whether, according to its true legal effect, this agreement is a sale of a lease or a grant of an underlease, the defendant was not bound to shew his title.

[He referred to *Patman* v. *Harland*. (1)]

Elgood, for the plaintiff, was not called on.

POLLOCK, B. I am of opinion that the judgment is right. By the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 13, sub-s. 1, "On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to the reversion." That can mean nothing else than the leasehold reversion of the lease out of which the sublease is to be granted. Then by s. 3, sub-s. 1, "Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion." I am of opinion that these words mean the reversion of that leasehold interest out of which the term of years contracted to be sold and assigned is derived.

HAWKINS, J., concurred.

Appeal dismissed.

Solicitor for plaintiff: *Ollivant.*

Solicitors for defendant: *Marsden & Son.*

(1) 17 Ch. D. 353.

P. B. H.

KNIGHT *v.* LEE. 1892 Oct. 31.

Gaming—Betting Agent—Payment of Bets by, on Principal's Account—Gaming Act, 1892 (55 *& 56 Vict. c.* 9)—*Action commenced after passing of Act to recover Payments made before—Whether Act retrospective.*

The Gaming Act, 1892, s. 1, provides that "any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of 8 & 9 Vict. c. 109 . . . . shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

The defendant employed the plaintiff, a betting agent, to make certain bets in his (the plaintiff's) name on the defendant's behalf. The bets having been made and lost, the plaintiff paid the amount of the losses on the defendant's account. This occurred prior to the passing of the Gaming Act, 1892. After the passing of the Act, the plaintiff commenced an action to recover from the defendant the money so paid:—

Held, that, the Act was not retrospective, and that the action might be maintained.

APPEAL from the county court of Wiltshire.

The plaintiff, a betting agent, between November 4 and 28, 1891, made, on the defendant's instructions, a number of bets in his own (the plaintiff's) name on horse-races on the defendant's account. The plaintiff credited the defendant with the amounts of the bets which he won, but there remained in respect of the bets lost, a balance against the defendant of 11*l.* 12*s.* 6*d.* The whole of the losses on such bets were paid by the plaintiff in the said month of November to the persons with whom the bets were made. The defendant having refused to pay the said balance of the plaintiff's account, the plaintiff in July, 1892, brought an action in the county court to recover it. The Gaming Act, 1892, had been passed in the interval on May 20. The judge held that that Act only prohibited the bringing of actions to recover money payable under promises made after the passing of the Act, and he accordingly gave judgment for the plaintiff. The defendant appealed.

Morten, for the defendant, having read s. 1 of the Act, the Court called upon

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D'Eyncourt, for the plaintiff. The Act is not retrospective. According to the decision in *Read* v. *Anderson* (1), the plaintiff had a good cause of action vested at the time of the passing of the Act, and it cannot be supposed that the legislature intended to interfere with such a vested interest. In *Moon* v. *Durden* (2) it was decided that s. 18 of 8 & 9 Vict. c. 109, which enacted that "all contracts and agreements by way of gaming or wagering shall be null and void, and no suit shall be brought or maintained . . . . for recovering any sum of money . . . . alleged to be won upon any wager," had not a retrospective operation, so as to defeat an action for a wager commenced before the statute passed. The words of the two statutes are practically identical, and therefore that case is decisive of the present.

Morten, in reply. It is conceded that the earlier part of the section making the class of promises therein specified null and void is not retrospective, and relates only to promises made after the passing of the Act; but it is contended that the latter part of the section prohibiting the bringing of actions is retrospective to this extent that the action must have been commenced before the Act. If it is not so the latter part is mere surplusage and can have no effect given to it, for it does not carry the change of the law any further than it is already carried by the former part. The case of *Moon* v. *Durden* (2) is not in point, for there the action was commenced before the Act, and Alderson, B., expressly refused (at p. 42) to decide what would be the rights of the parties if the action were not begun till after the Act.

MATHEW, J. I am of opinion that the decision of the county court judge in this case must be affirmed. The defendant employed the plaintiff, a betting agent, to make bets on his behalf. The plaintiff made bets for him accordingly, and such bets being lost, he paid on the defendant's account the amount of the losses. This took place in November, 1891, and, consequently, having regard to the state of the law at that time, the plaintiff, upon payment of such losses, became entitled to recover their amount from his principal. But before any action was commenced to recover the money from the defendant, the

(1) 13 Q. B. D. 779. (2) 2 Ex. 22.

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Gaming Act, 1892, was passed; and it is contended that that statute deprives the plaintiff of his right of action. It would, however, be altogether contrary to principle to hold that the statute had a retrospective operation so as to take away a vested cause of action, unless the language clearly compels us to do so. The implied promise by the defendant to repay to the plaintiff the sums paid by him on the defendant's account, was a perfectly valid promise at the date when it was made, and the presumption is that the legislature did not by subsequent legislation intend to deprive the plaintiff of his rights under that promise. The language of the Act in question is as follows: "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto, or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." Mr. Morten admitted that the former part of the section, making the promises therein-named null and void, was prospective only and related only to future promises; but he contended that the latter part of the section must be held to apply to past promises as well as to future; for that otherwise it would cover no wider ground than the former, and, consequently, would be wholly unnecessary. It may be that the latter part is redundant; but that objection does not oblige us to hold that it was intended to be retrospective. Exactly the same argument was urged in *Moon* v. *Durden* (1) upon similar language in 8 & 9 Vict. c. 109, and was overruled by the Court. Moreover, it is to be observed that the section says that "no action shall be brought or maintained to recover any *such* sum of money," that is to say a sum of money payable under a promise of the kind mentioned in the former part of the section. But if, as has been conceded, the former part of the section is not retrospective, then it follows that neither is the latter. If we were to hold otherwise we should be disregarding the use of the word "such" in the section.

(1) 2 Ex. 22.

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BRUCE, J. I am of the same opinion. The Court is always reluctant to construe a statute so as to give it a retrospective operation. Here the plaintiff had a vested right of action acquired before the statute came into force, and it cannot be supposed that the statute was intended to take such a right away. The decision of the county court judge must be affirmed.

Appeal dismissed.

Solicitor for plaintiff: *H. J. King.*

Solicitors for defendant: *Clarke, Rawlins & Co.*

J. F. C.

Followed. MACDONALD *v.* GREEN [1951] 1 K. B. 594

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Nov. 3.

TATAM *v.* REEVE.

Gaming—Money paid—Implied Contract—8 & 9 *Vict. c.* 109—*The Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1—*Money paid "in respect of" a Contract of Betting.*

The Gaming Act, 1892, s. 1, enacts that any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109, shall be null and void, and no action shall be brought or maintained to recover any such sum of money:—

Held, that money paid by the plaintiff for the defendant at his request to persons with whom the defendant had lost bets was money paid "in respect of" a gaming contract within the meaning of the Gaming Act, 1892, and therefore that the plaintiff could not recover the sums so paid by him from the defendant.

SUMMONS referred to the Court by a judge at chambers.

The action was brought to recover 148*l.*, money paid by the plaintiff to the use of the defendant at his request.

Upon an application for judgment under Order XIV. the judge at chambers, with the consent of the parties, referred the matter to the Divisional Court, the hearing in that Court to be treated as the trial of the action upon the facts stated in the affidavits, which, so far as material, were as follows: On July 4, 1892, the plaintiff received a letter from the defendant in these terms:—

"Dear Mr. Tatam,—Kindly settle the enclosed account for me, as I don't know where to find all the men, and I have to catch an early train to Henley.

"Yours truly,

"H. Reeve."

The account inclosed purported to shew that the defendant was indebted to four persons named in the indorsement on the writ of summons in the respective sums, amounting to 148*l.*, set opposite their names. The plaintiff paid the sums to the persons named on the same day. The sums were due from the defendant to the persons named for bets on horse-races which the defendant had made and lost, and the payments were made after the Gaming Act, 1892 (55 & 56 Vict. c. 9), came into force. The plaintiff, in his affidavit, stated that the amounts paid by him were not in respect of any bets made by him on behalf of the defendant; that he simply paid them on the defendant's request contained in the letter of July 4, 1892, and was not in any way liable to pay them. There was no statement in the affidavits that the plaintiff knew that the payments were for bets.

Bosanquet, Q.C., and *Lynden Bell*, for the plaintiff. The plaintiff is entitled to judgment for money paid for the defendant at his request. The Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1, does not touch the transaction between the plaintiff and the defendant. The plaintiff did not pay the money "under or in respect of" any contract rendered void by 8 & 9 Vict. c. 109. He paid it merely upon the request of the defendant, and under a promise to repay him implied from that request. The Gaming Act, 1892, was passed to get rid of the decision in *Read* v. *Anderson*. (1) In that case the Court of Appeal held that, where a commission agent was employed to make bets for his principal, there was an implied contract by the principal to repay the agent the sums which he had paid. The Act of 1892 meant to strike at transactions in which the person who paid money was a party, as agent, to the contract of gaming. The words "paid by him under or in respect of any contract," &c., mean paid by him under or in respect of any contract to which he was a party. The words "or in respect of" are tautological, and mean the same thing as "under." There is no statement in the affidavits that the plaintiff knew that the money he paid was in respect of bets lost by the defendant, and such knowledge ought not to be inferred by the Court, though it is immaterial for the purpose of

(1) 10 Q. B. D. 100; 13 Q. B. D. 779.

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construing the statute whether he knew or not. If the true construction of the statute is that a person cannot recover for money paid at the request of another, whenever it turns out that the money was owing in respect of a gaming transaction, it will cast upon all persons paying money for others the onus of inquiring for what the money is due. The statute did not intend to strike at an innocent person merely paying money at the request of another.

Morton Daniel, for the defendant, was not heard.

LORD COLERIDGE, C.J. I confess that I feel no hesitation in deciding this case. I think that our judgment ought to be for the defendant. If one man chooses to trust another in matters which are called matters of honour, he must do so at his own risk and with full knowledge that he must suffer, if the person whom he has trusted chooses to repudiate what is called his debt of honour. The statute 8 & 9 Vict. c. 109, was interpreted in the famous case of *Read* v. *Anderson* (1), in which Lord Esher, M.R., dissented in an emphatic manner from the judgments of the other two members of the Court. The decision of the Court of Appeal was, that when a commission agent was employed to make bets on behalf of his principal, it being admitted that if the bets had been made between principals only the contracts would have been null and void under the statute, nevertheless, an implied contract arose and could be enforced for repayment by the principal to the agent of the sums which the agent had paid upon the order of the principal. I may say that at the time that case was decided I entirely agreed with the dissent expressed by the Master of the Rolls. I thought that *Read* v. *Anderson* (1) really cut at the root of the value and principle of the statute, because it was a decision that if you employed somebody else to do that which you could not, so as to make it effectual at law, do yourself, you could in effect make a good contract in respect of a gaming debt. However, that was the decision, and so the law was. In the present year an Act of Parliament was passed to amend the 8 & 9 Vict. c. 109. It enacts that "any promise, express or implied, to pay any person any sum of money paid

(1) 10 Q. B. D. 100; 13 Q. B. D. 779.

by him under or in respect of any contract or agreement rendered null and void by the Act of the 8 & 9 Vict. c. 109 .... shall be null and void, and no action shall be brought or maintained to recover any such sum of money." The facts in the present case are these: The plaintiff was desired by the defendant to pay certain sums of money to certain persons named in the affidavits. He did so. All the sums of money were, as a matter of fact, due for bets which the defendant had made and lost. It was argued that the sums were not paid "in respect of" bets within the meaning of the Act of Parliament. I cannot feel any doubt or hesitation in coming to the conclusion that they were paid "in respect of a contract or agreement rendered null and void by 8 & 9 Vict. c. 109." I agree that they were not paid "under" such a contract or agreement, because there was no contract of betting or gaming between the plaintiff and the defendant; but the money was paid in respect of gaming debts which the defendant owed to the persons to whom the plaintiff paid it, and it was paid in order to discharge those debts. Except that the defendant owed the money to those persons, he would not have given the plaintiff the order to pay it: how can it be said that it was not paid "in respect of" those debts? I decide this case with the less hesitation that I think the plaintiff was not an ignorant person in the transaction. If it was the case of a man deceived into making payments in respect of a matter he knew nothing whatever about, there would at any rate be something to make us sorry to come to the conclusion that he could not recover; but in this case I think he knew perfectly well what he was about. He has chosen to deal with a matter which is called a matter of honour, and he must take the risk of the defendant refusing to repay him what he has paid.

I am of opinion that there should be judgment for the defendant.

WILLS, J. I am of the same opinion. A great part of the argument of the plaintiff's counsel was founded on the assumption that the only object of the statute, 55 & 56 Vict. c. 9, was to get rid of the decision in *Read* v. *Anderson*. (1) If that was all which

(1) 10 Q. B. D. 100; 13 Q. B. D. 779.

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Wills, J.

the statute effected it would not touch this case; because the plaintiff did not make the bets which he paid, and the case is not, therefore, like *Read* v. *Anderson*. (1) But during the argument I asked the plaintiff's counsel what meaning could be given to the words "or in respect of," which are in the statute in addition to the word "under;" because, if the only object of the statute was to get rid of *Read* v. *Anderson* (1), the word "under" would have been sufficient. The only suggestion made in answer to my question was that the words "or in respect of" were tautological and meant the same thing as "under." I cannot think so. It is a short Act of Parliament, and the language used is very clear and intelligible. I think that the words were put in purposely; and, if they are to be given any meaning at all, they must be intended to strike at transactions such as this. I do not think it makes any difference whether the plaintiff knew, or did not know, that the payments he made were in payment of bets; because, if those payments were made "in respect of" betting contracts, he is brought within the very words of the Act. It is satisfactory to think that our construction of the Act is not likely to work any great injustice, because if a person pays money for another upon what amounts to a representation that it is not payable in respect of any contract or agreement which comes within the Act, the person on whose behalf the money is paid would be estopped from setting up the Act as an answer to the claim of the person who paid it. If it were necessary to decide the question, I think the affidavits shew that the plaintiff did know the nature of the transaction in respect of which he paid the money. I have no doubt he knew the money was paid for bets.

Judgment for the defendant.

Solicitors for plaintiff: *Thorneycroft & Willis.*
Solicitor for defendant: *T. R. Apps.*

(1) 10 Q. B. D. 100; 13 Q. B. D. 779.

W. A.

COWAP, Appellant *v.* ATHERTON, Respondent. 1892 *Nov.* 3.

Licensing Acts—Offences—Sale during prohibited Hours—"Bonâ fide Traveller"—Refreshment on Sunday—37 & 38 *Vict. c.* 49, *ss.* 9, 10.

The appellant was charged with selling beer on licensed premises during prohibited hours. The beer was sold to a railway porter, who early on Sunday morning walked from his house, where he had slept, to a railway station, and travelled thence by train to another station, where he was on duty during the first part of the day. During the interval between two trains he went for a walk to occupy his time, and visited the appellant's inn, where he was supplied with beer at about 9.45 on Sunday morning. The inn was more than three miles from his house:—

Held, that the porter was a bonâ fide traveller, within the meaning of s. 10 of the Licensing Act, 1874, and therefore the appellant could not be convicted under s. 9 of selling beer during the time at which the premises were directed to be closed.

Case stated by justices for the county of Chester.

The appellant, Mary Ann Cowap, was charged with selling intoxicating liquor to Alfred Halsey at her licensed premises, the Horns Inn, at Little Leigh, at a time when the premises were required to be closed, namely, at 9.45 in the morning on Sunday, May 22, 1892.

It was proved that at about 8.45 A.M. Halsey came to the back door of the Horns Inn, and knocked, and the door was opened by the appellant's son. Halsey entered, and remained in the house for nearly an hour. On entering the house the police found Halsey in the kitchen; he had beer before him; according to the evidence of the police, he said: "I have come for a walk and a drink."

Halsey was a railway porter employed by the London and North Western Railway, and resided at Hartford. Acton Bridge station was less than a mile, and Hartford about three and a half miles, from the Horns Inn.

Halsey was called as a witness, and deposed that he had Sunday duty at Acton Bridge station every third Sunday, and had the first turn on the Sunday in question; that he slept on the Saturday night at his house at Hartford, had his breakfast at 5.45 A.M., and left home to go by the 6.39 A.M. train from Hartford to Acton Bridge; that the distance from his home to

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Hartford station was about three quarters of a mile, and the distance from Hartford station to Acton Bridge station was two and a half miles; that at about 8 A.M. he had finished all his work, except that he had to attend to a train which would arrive in about an hour or two, so he walked down the road in order to occupy his time; when he was near the inn it began to rain, so he went in for shelter and for refreshments. He maintained that the statement he made to the police was, "I have come for a walk and for refreshments." Halsey said that he had some bread and cheese, for which he paid twopence, as well as a pint of ale, for which he paid threepence. This was corroborated by the appellant and her son. Halsey swore that he had walked and had travelled by train on the morning in question six and three quarter miles, and that he had no refreshments with him at the station, and consequently that he required some, seeing that he would not be able to get home until shortly before noon.

The justices were of opinion that the evidence brought the case within the operation of the statute, and gave judgment against the appellant.

The judgment of the Court was requested as to whether the justices were correct in point of law in their determination, and, if not, as to what should be done or ordered by the Court.

Poland, Q.C. (*Pickford*, with him), for the appellant. The conviction was wrong, on the ground that the evidence shews Halsey to have been a bonâ fide traveller within the meaning of s. 10 of the Licensing Act, 1874. (1)

It is found in the case that the inn was more than three miles

(1) 37 & 38 Vict. c. 49. By s. 3, licensed premises outside the metropolitan district are to be kept closed on Sunday morning until 12.30 p.m.

Sect. 9 imposes penalties for the sale of intoxicating liquors during the time at which premises are directed to be closed.

By s. 10: "Nothing in this Act or in the Licensing Act, 1872, contained shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor at any time to bonâ fide travellers . . . . A person for the purposes of this Act and the Licensing Act, 1872, shall not be deemed to be a bonâ fide traveller unless the place where he lodged during the preceding night is at least three miles distant from the place where he demands to be supplied with liquor, such distance to be calculated by the nearest public thoroughfare."

from Halsey's house, where he slept the preceding night, and the proof of bona fides is strong, for the refreshment was reasonably necessary. In proceeding from his house to his work at Acton Bridge station Halsey was clearly acting as a bonâ fide traveller, and the fact that he called at the inn while taking a walk to pass the time during the interval between the trains cannot alter his position, for a man may be a bonâ fide traveller whether travelling for business or for pleasure: *Atkinson* v. *Sellers* (1); *Taylor* v. *Humphreys*. (2) All the decided cases support the appellant's contention: *Peplow* v. *Richardson* (3); *Oldham* v. *Sheasby* (4); *Dames* v. *Bond*. (5)

W. Wightman Wood, for the respondent. Halsey was not a bonâ fide traveller at the time when he was supplied with the beer. He may have been a bonâ fide traveller when he was going to his work at Acton Bridge station; but he ceased to be such when he went for a walk, in order, as he himself admitted, to obtain refreshment. The cases which have been referred to shew that if a man travels in order to get drink he is not a bonâ fide traveller, and *Taylor* v. *Humphries* (6) is to the same effect. The fact that the inn was over three miles from Halsey's house cannot of itself make him a bonâ fide traveller, for the words of s. 10 are negative—"shall not be deemed to be a bonâ fide traveller unless," &c.

Poland, Q.C., was not heard in reply.

POLLOCK, B. The only question is whether, if the conduct of the person to whom the beer was supplied was bonâ fide, he was entitled to prolong or extend his journey to the public-house for the purpose of getting refreshment. Whether he habitually did so or only did so on this one occasion would be immaterial; but I cannot doubt that if he chose, and the time permitted it, he was entitled to go to a place beyond the distance of three miles from his residence, and, if he was acting bonâ fide, then, according to the Act of Parliament and the decisions, he was entitled

(1) 5 C. B. (N.S.) 442; 28 L. J. (M.C.) 12.
(2) 10 C. B. (N.S.) 429; 30 L. J. (M.C.) 242.
(3) Law Rep. 4 C. P. 168.
(4) 60 L. J. (M.C.) 81; 55 J. P. 214.
(5) 55 J. P. 503.
(6) 17 C. B. (N.S.) 539; 34 L. J. (M.C.) 1.

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to do what the case shews that he has done, and was a bonâ fide traveller. I am, therefore, of opinion that the conviction cannot stand.

HAWKINS, J. I am of the same opinion. The case comes directly within the law as stated in *Oldham* v. *Sheasby*. (1) The man started from his home to go to Acton Bridge on business, and had to remain there and attend to the trains. In the interval between two trains he walked to the public-house, which was more than three miles from his residence, and had some beer. I cannot conceive it possible that the legislature meant that under such circumstances a man was not to be considered a bonâ fide traveller, and all the cases bearing on the point are opposed to any such view.

Conviction quashed.

Solicitor for appellant: *William Colley, for Browne, Warrington.*

Solicitors for respondent: *Field, Roscoe & Co., for Greenall & Buckton, Warrington.*

P. B. H.

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Oct. 31.

PUDNEY *v.* ECCLES.

Game—Excise Licence to deal in—Foreign Game—23 & 24 Vict. c. 90, *s.* 14—24 *& 25 Vict. c.* 91, *s.* 17.

An excise licence to deal in game under 23 & 24 Vict. c. 90, s. 14, is not required to enable a person to deal here in game which has been killed abroad.

CASE stated by a metropolitan police magistrate.

The respondent, on March 24, 1892, exposed for sale in his shop, at 325, Old Kent Road, a hare and a brace of black game, which he on the same day sold to the appellant. The respondent at the time of such sale did not hold an excise licence to deal in game. The hare and black game so sold had been killed in Russia and imported into this country for purposes of sale. The appellant, an officer of the Inland Revenue, laid an information charging the respondent with dealing in game without having first obtained a licence for that purpose, contrary to the provisions of 23 & 24 Vict. c. 90, s. 14, and 24 & 25 Vict. c. 91, s. 17.

(1) 60 L. J. (M.C.) 81.

The magistrate held that, the game having been killed abroad, no excise licence was required; and he accordingly dismissed the information, subject to a case for the decision of the Court.

Danckwerts, for the appellant. The magistrate proceeded upon the authority of the case of *Guyer* v. *Reg.* (1), where it was held that s. 4 of the Game Act, 1831 (1 & 2 Wm. 4, c. 32), which prohibits a licensed dealer from having in his possession birds of game during the close season, did not apply to birds killed abroad. But that was a section which, being passed for the purpose of the preservation of game in England, could only apply to English birds. The licensing sections, however, even under that Act, had a wholly different object, being passed solely for the raising of revenue. This is shewn by the fact that a licence was necessary under that Act for the selling of hares just as much as for the selling of birds of game; though the Act did not preserve hares in the same way that it did birds, for it created no close season for hares. In *Saunders* v. *Baldy* (2) the requirement of a certificate for killing game was held to be for the protection of the revenue; but, if so, then equally must the requirement of a licence to deal in game be so. There is no reason for limiting the revenue clauses of that Act to English game, the language being perfectly general. The case of *Guyer* v. *Reg.* (1), therefore, is not in point. But if the revenue clauses of the Act of 1831 were intended to apply to foreign as well as English game, a fortiori must the Act of 1860 (23 & 24 Vict. c. 90) do so, for it is a revenue Act and nothing more.

H. Sutton, for the respondent, was not called upon.

MATHEW, J. The question is, whether the respondent, who sold certain game without previously obtaining the licence required by s. 14 of 23 & 24 Vict. c. 90, is liable to the penalties created by that section, notwithstanding that the game so sold was not English game, but had been killed abroad and imported here for purposes of sale. In my judgment, we can only construe that Act in connection with the earlier Act of 1 & 2 Wm. 4, c. 32, and it is to my mind perfectly clear what the scheme of

(1) 23 Q. B. D. 100. (2) 13 L. T. (N.S.) 322.

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legislation contemplated by that earlier Act was. It imposed, in the first place, the obligation of obtaining a certificate to kill game; secondly, it provided that only a person who had obtained such a certificate should sell game to a dealer; and, thirdly, it imposed the obligation upon the dealer of obtaining a licence to enable him to purchase the game from the certificated person and to resell it. So far as the certificate to kill game is concerned, it is obvious that it could only refer to game killed in England. But I think it is equally clear that the licence to deal in game was also only intended to refer to game killed in England. When we turn to the form of dealer's licence given in Sched. A to that Act, it is plain that both licence and certificate relate to the same class of game: "We, being justices, &c. . . . . do hereby authorize and empower A. B., of ——, being a householder (or keeper of a shop or stall), to buy game from any person authorized to sell game by virtue of the Act of 1 & 2 Wm. 4, &c. . . . . and we do also authorize and empower the said A. B. to sell at his house (shop or stall) any game so bought." The licence only applies to game "so bought"—that is to say, bought from a person who by virtue of his certificate was entitled to kill game, and to sell it when killed. If we were to hold that that Act applied to game reared and killed abroad, we should be landed in the absurd conclusion pointed out by my brother Hawkins in *Guyer* v. *Reg.* (1), that "a person duly licensed to deal in game might be convicted in a penalty for buying at any period of the year, even out of the close period, from a Russian dealer, a Russian partridge in season, killed in that country, simply on the ground that he was not authorized to kill and take game in England for want of a game certificate. Whereas, if he bought the same bird of a person who had a game certificate empowering him to kill game in England, where the bird never was a living bird, and where, therefore, it is clear it could not have been killed under such certificate, the purchase would have been perfectly lawful." It was, indeed, pressed upon us that the sections of that Act imposing upon persons the obligation of obtaining certificates and licences were purely revenue clauses, intended merely for the protection of the revenue; and it was contended

(1) 23 Q. B. D. 100.

that we ought so to construe them as to extend that protection to the widest limit. But, assuming that they are only revenue clauses, we cannot give an effect to them wider than the general scope of the Act; we must assume that it was intended to raise no revenue thereby except in connection with game of the kind dealt with by the Act generally. But then it was said that, if there was any doubt about the construction which ought to be put upon the licensing clauses of the Act of Wm. 4, that difficulty is entirely removed by the Act of 1860 (23 & 24 Vict. c. 90), for that the intention of that Act is plainly to raise revenue from the sale of game of any description. But in that I cannot agree, for when we turn to the Act of 1860 we find that it expressly refers to the Act of Wm. 4, and incorporates it, as it were, so far as it is not altered by it. Sect. 14 provides that "Every person who shall have obtained any licence to deal in game from the justices of the peace, under the provisions of the said two several Acts in the preceding clause mentioned" (viz., 1 & 2 Wm. 4, c. 32, and the amending Act of 2 & 3 Vict. c. 35) "shall annually, and during the continuance of such licence, and before he shall be empowered to deal in game under such licence, obtain a further licence to deal in game under this Act on payment of the duty hereby charged thereon"—that is to say, a licence to deal in game of the same description as that referred to in the earlier statutes. I am of opinion that the magistrate's decision was right and must be upheld.

BRUCE, J. I am of the same opinion. There can be no doubt that the later statute must be read in connection with the earlier statute of Wm. 4; and it is, I think, clear that the provisions of the earlier statute related only to English game. The reasoning of Hawkins, J., in *Guyer* v. *Reg.* (1), seems to me conclusive; and I think it is as applicable to the present case as to the one with which he was then dealing. The appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *Solicitor to the Inland Revenue.*
Solicitor for respondent: *Solicitor to the Treasury.*

(1) 23 Q. B. D. 100. J. F. C.

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Oct. 25.

IN RE AN ARBITRATION BETWEEN THE RICHMOND GAS COMPANY AND THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF RICHMOND (SURREY).

Gasworks Clauses Acts—Supply of Gas—Statutory obligation of Corporation to pay for Gas supplied to Public Lamps—Insufficient Supply—Pipes blocked in consequence of exceptional Frost—Richmond Gas Acts, 1867 *and* 1881 (30 *&* 31 *Vict. c. c.*; 44 *&* 45 *Vict. c. xxxv.*)—*Gasworks Clauses Act,* 1871 (34 *&* 35 *Vict. c.* 41), *ss.* 24, 36.

By the Richmond Gas Acts, 1867 and 1881, with which were incorporated the Gasworks Clauses Acts, 1847 and 1871, the Richmond Gas Company were required to supply gas to the public lamps in the parish of Richmond, and the charge for supplying such gas was fixed at a certain annual sum per lamp—the lamps to be lighted from sunset to sunrise, and the burners used therein not to consume less than a certain amount per hour. During the months of December, 1890, and January, 1891, in consequence of exceptional frost, the pipes became blocked with ice, and the supply of gas to the public lamps was insufficient:—

Held, that the corporation of Richmond were bound to pay the fixed annual sum in respect of such lamps, notwithstanding the insufficiency of the supply of gas.

SPECIAL CASE stated for the opinion of the Court by an arbitrator under 52 & 53 Vict. c. 49.

The following statement is taken from the special case:—

The Richmond Gas Company are incorporated by Acts of Parliament, and are thereby authorized to supply gas within certain limits, which include the parish of Richmond, in the county of Surrey. The Acts enabling the company are the Richmond Gas Act, 1867 (30 & 31 Vict. c. c.), and the Richmond Gas Act, 1881 (44 & 45 Vict. c. xxxv.). The latter incorporates the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), and the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41).

By s. 48 of the Richmond Gas Act, 1867, it is provided (inter alia) that "the company shall and they are hereby required from time to time, and at such times as they may be called upon so to do by the vestry of the parish of Richmond, or other the persons charged with the lighting of any street or place within the parish of Richmond, supply gas to all public lamps or burners adjoining to or within seventy yards of any of the mains of the

company, and that may be required and provided for lighting any street or place within the said parish upon such terms and during such hour as shall from time to time be settled between the company and the vestry or other the persons aforesaid."

By s. 24 of the Gasworks Clauses Act, 1871, it is provided (inter alia) that "The undertakers shall supply gas to any public lamps within the distance of fifty yards from any of the mains of the undertakers in such quantities as the local authority of each district, or the trustees of any turnpike road, or any highway board within the limits of the special Act, may from time to time require to be supplied, and the price to be charged by the undertakers and to be paid to them for all gas so supplied shall be settled by agreement between the local authorities and the undertakers."

By s. 36 it is provided (inter alia) that "Whenever the undertakers neglect or refuse to supply gas as by this Act required to all or any of the public lamps in accordance with the provisions of this Act, they shall be liable to a penalty not exceeding 40*s.* for each default."

By s. 25 of the Richmond Gas Act, 1881, it is provided that "The charge for supplying gas to the public lamps in the parish of Richmond, including the providing and use of such lamps and all proper lamp-posts, lamp-irons, burners, and fittings connected therewith; also the renewing and maintaining the same, and the lighting, cleaning, and extinguishing the lamps, shall on and from the 30th day of June, 1881, be 4*l.* 5*s.* per lamp per annum, subject to an increase or reduction of 5*s.* per lamp per annum for every increase or reduction of 3*d.* per 1000 cubic feet to the ordinary consumer within the said parish. The said lamps to be lighted from sunset to sunrise, and the burners used therein to consume not less than five cubic feet of gas per hour."

From October 1, 1890, to March 31, 1891, the gas company, in pursuance of this section, but subject as hereinafter stated, supplied gas to the parish of Richmond. The duty of providing for the public lighting of the parish was, until June 30, 1890, vested in the vestry of the parish as the urban sanitary authority. On that day the mayor, aldermen, and burgesses of Richmond were incorporated by royal charter, and all rights, interests,

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powers, duties, property, obligations, and liabilities whatsoever of the vestry as such urban sanitary authority, were transferred to the mayor, aldermen, and burgesses, acting by their council, as the sanitary authority of the borough of Richmond.

During the months of December, 1890, and January, 1891, it frequently happened that many of the public lamps in the parish of Richmond were not kept lighted by the company from sunset to sunrise, and that many others were supplied with and consumed less than five cubic feet of gas per hour. For the purposes of the case it was admitted that the cause of the matters mentioned in the last paragraph was that by reason of the frost which occurred in the said months of December and January the aqueous vapour unavoidably present in the gas was frozen in the pipes, and that naphthaline crystals were deposited therein, and that by the ice and crystals so formed the pipes were on several occasions stopped up and the passage of the gas to the burners prevented. It was also admitted that some of the frosts which occurred in the said months were of exceptional duration and severity, and that the company made special efforts to overcome the above-mentioned obstruction, and during the continuance of the frost employed extra labour and spent large sums of money in such efforts.

The company contended that they were entitled to be paid in respect of all the public lamps the full price provided by s. 25 of the Richmond Gas Act, 1881, without any deduction in respect of the deficiency of supply, and without having to make or allow to the corporation of Richmond any payment, whether by way of damages or otherwise, in respect of the same; and they further contended that the only remedy of the corporation, if any, was to sue for penalties under s. 36 of the Gasworks Clauses Act, 1871. The corporation, on the other hand, contended that in cases where there had been such a deficiency of supply, whether due to the causes stated or otherwise, the company were not entitled to recover the full statutory charge, but could only recover such sum as might be fair, having regard to the gas actually provided.

The question for the Court was which of these contentions was well founded in law.

A. J. Ram, for the gas company. When a statutory duty is imposed on any person, vis major is a valid excuse for non-performance: *River Wear Commissioners* v. *Adamson*. (1) The company did all in their power to overcome the obstruction. The statute did not make them insurers of the lighting of Richmond. The proper and only method of proceeding against them for any breach of their statutory duty is by suing them for penalties under s. 36 of the Gasworks Clauses Act, 1871: *Atkinson* v. *Newcastle Waterworks Co.* (2); *Vallance* v. *Falle*. (3)

C. A. Russell, for the corporation of Richmond. The point of the case is not whether the company are liable for damages for the breach of the statutory duty, but whether the corporation are bound to pay for what they have never had. In consequence of the pipes being blocked with ice, the gas never got outside the property of the company, and was not consumed at all. The company cannot therefore claim payment for what they have not supplied. It is true that they might not be liable for penalties since they have not neglected or refused to supply the gas; but since during two months the gas was not consumed, they cannot charge for it, and a deduction ought to be made from their charges in respect of those two months. It must be treated as a case of contract in which the legislature has made the bargain for the parties.

MATHEW, J. In this case our judgment must be for the gas company. The question raised by the case is whether the company must submit to reduction in the statutory price charged for the gas in respect of a deficient supply during the months of December, 1890, and January, 1891. We do not derive much aid in answering this question from cases arising on contracts. By certain Acts of Parliament the Richmond Gas Company were required to supply gas to the parish of Richmond, and to provide all lamp-posts, lamp-irons, burners, and fittings, and to renew and maintain the same. The investment by the company of a large sum of money was therefore required, and the gas company were constituted on the terms contained in the Acts of

(1) 2 App. Cas. 743. (2) 2 Ex. D. 441.
(3) 13 Q. B. D. 109.

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IN RE RICHMOND GAS COMPANY AND MAYOR, &C., OF BOROUGH OF RICHMOND (SURREY).

Mathew, J.

Parliament. One of those terms was that the charge for supplying gas to the public lamps, including the providing and use of such lamps and their fittings, and their renewal and maintenance, lighting, cleaning, and extinguishing, should be 4*l.* 5*s.* per lamp per annum. The Act incorporated a very important clause, namely, s. 36 of the Gasworks Clauses Act, 1871: "Whenever the undertakers neglect or refuse to supply gas as by this Act required to all or any of the public lamps in accordance with the provisions of this Act, they shall be liable to a penalty not exceeding 40*s.* for each default." The essence of the offence created by that section is the neglect or refusal to supply gas. In the present case what occurred was that during the two months in question the weather was so severe that the pipes became blocked with ice, and it became impossible to convey the gas to the lamps through the ordinary channel of the gas-pipes. It is admitted that the frosts during those months were of exceptional duration and severity. It is also admitted that the company made special efforts to overcome the obstruction, and during the continuance of the frost employed extra labour and spent large sums of money for that purpose. The company, in fact, did all that they could do, and there was no such neglect or refusal on their part to supply gas as would justify the imposition of a penalty. Are they, therefore, entitled to be paid the lump sum fixed by the statute? Mr. Russell contends that this was a contract by which the gas company were bound to supply light to the lamps, and that because no light was supplied, the company are not entitled to their money. In other words, he says that the statute is to be construed as imposing an obligation on the company to insure the lighting of all the lamps in Richmond. Sect. 25 of the Act of 1881 no doubt provides that the lamps should be lighted from sunset to sunrise; but to say that, if from any cause over which the company had no control the lamps were put out, the company would not be entitled to their money, would be a most unreasonable construction of the section. In my opinion, full effect can only be given to the section by treating the 4*l.* 5*s.* per lamp per annum as a lump sum to be paid by the corporation, which cannot be apportioned or divided; and therefore I think that it is no answer to the claim of the

company to say that from a cause admittedly inevitable the lamps were not alight during the whole period.

BRUCE, J. I am of the same opinion. I admit that at first it seemed to me unreasonable that the corporation should have to pay 4*l.* 5*s.* in respect of lamps from which they had not had the full benefit; but on consideration it seems to me clear that this is a statutory obligation imposed on the corporation. The company are bound to provide gas, and also lamps and their fittings. If they neglect or refuse to supply gas, they are liable to penalties. On the other hand, the corporation are obliged to pay to them the sum of 4*l.* 5*s.* per annum in respect of each public lamp. That is a statutory obligation which they must discharge. It has been suggested that this sum ought to be apportioned where the gas company have failed to supply gas for part of the year. I cannot find any provision for such apportionment, and it would obviously be unreasonable in the highest degree to say that because the company were prevented, at the most for two months, from supplying gas to the lamps in question, nothing should be paid to them in respect of the supply of gas to those lamps for the whole year. I agree, therefore, that we must answer this question in favour of the gas company, and the case will be remitted to the arbitrator with this expression of our opinion.

Case remitted to arbitrator.

Solicitors for the gas company: *Trollope & Winckworth, for Smith & Burrell, Richmond.*

Solicitor for the corporation of Richmond: *F. B. Senior.*

A. P. P. K.

1892
Oct. 25.

HASTINGS, LIMITED *v.* PEARSON.

Factor—Person Employed to Sell on Commission—Goods Pledged with Pawnbroker—Validity of Pledge—Factors Act, 1889 (52 & 53 *Vict. c.* 45), *ss.* 1, 2.

The plaintiffs, a firm of jewellers, employed B. at a small salary to sell goods for them, retail, on commission. He, however, without authority from them, pawned the goods with the defendant, who was a pawnbroker, and who received the goods in good faith and in the ordinary course of his business. In an action by the plaintiffs to recover the goods from the defendant:—

Held, that B. was not a mercantile agent within the meaning of the Factors Act, 1889 (52 & 53 Vict. c. 45), and, therefore, that s. 2 of that Act afforded the defendant no protection.

APPEAL by the plaintiffs from the decision of the judge of the Lambeth County Court.

The plaintiffs were a company carrying on business as jewellers, and it appeared that in July, 1891, they employed a man named Brooke, at a salary of 30*s.* per week and 5 per cent. commission on cash collected, to sell goods for them at private houses. This commission was afterwards increased and the salary reduced. He was entrusted from time to time with goods to sell, and the evidence shewed that it was his duty to account weekly for such goods to the plaintiffs, and that he had no authority to pawn them. He, however, pawned a number of these goods with the defendant for his own benefit. The defendant took the goods in the ordinary course of business and in the bonâ fide belief that they were Brooke's own property. The plaintiffs sued the defendant in detinue to recover the goods, but the county court judge held that Brooke was a mercantile agent within the meaning of the Factors Act, 1889, and, therefore, that the defendant, having taken the goods in good faith and without notice that Brooke had no authority to pawn them, was protected by s. 2 of that Act (1), and he gave judgment for the defendant.

The plaintiffs appealed.

(1) By the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2, sub-s. 1: "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods

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Finlay, Q.C., and *Cluer*, for the plaintiffs. Brooke was not a mercantile agent within the meaning of the Factors Act, 1889. It is plain from the definition of "a mercantile agent" given by s. 1, that the mercantile agent contemplated by the legislature was a person engaged in legitimate business as a mercantile agent who, in the customary course of such business as agent, had to sell or pledge goods. The statute was intended to protect genuine mercantile transactions, and it cannot be applied to such a case as the present.

Tindal Atkinson, Q.C., and *C. L. Attenborough*, for the defendant. The definition of mercantile agent given by s. 1 of the Act is: "A mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." In this case Brooke had in the customary course of his business as agent authority to sell goods. He was, therefore, a mercantile agent for the sale of goods, and, under s. 2, sub-s. 1, a pledge made by him, although without authority, was as valid as if it had been expressly authorized.

[They cited *Heyman* v. *Flewker* (1); *Sheppard* v. *Union Bank of London*. (2)]

MATHEW, J. In my opinion this appeal must be allowed. The contention for the respondent would strike out from s. 2 of the Factors Act, 1889, the important and material words, "when acting in the ordinary course of business of a mercantile agent." The facts of the case appear to be as follows: A man was employed by the plaintiffs to take small articles of jewellery to private houses to sell. Instead of selling them for the benefit of his employers he pledged them for his own benefit, and then an action was brought to recover them from the pawnbroker with whom they were pledged.

The county court judge held that the pawnbroker was

to make the same; provided that the person taking under the disposition acts in good faith and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

(1) 13 C. B. (N.S.) 519.

(2) 7 H. & N. 661.

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protected by the Factors Act, 1889. By s. 2 of that Act: "Where a mercantile agent is with the consent of the owner in possession of goods, or of the documents of title to goods, any sale, pledge, or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same." By s. 1, sub-s. 1, the expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." It is plain, therefore, that the Act applies only to persons of the class ordinarily carrying on the business of mercantile agents, and that it has no reference to a man in such a position as Brooke was. There is no such business as that of an agent to pledge with pawnbrokers small articles of jewellery for the purpose of raising money for the employer of the agent. The Factors Act, therefore, does not apply to him at all, and this appeal must be allowed. Judgment will be entered for the plaintiff for a nominal sum, to be reduced to one shilling if the articles in question are given up.

BRUCE, J. I am of the same opinion.

Appeal allowed.

Solicitor for plaintiffs: *H. E. Tudor.*
Solicitor for defendant: *John Attenborough.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1892
Oct. 26.

KIMBER *v.* THE PRESS ASSOCIATION, LIMITED.

Defamation—Libel—Privilege—Report of Judicial Proceedings—Ex parte Application to Magistrates for Summons.

The publication, without malice, of a fair and accurate report of proceedings in open Court, before magistrates, upon an ex parte application for the issue of a summons for perjury, is privileged.

MOTION to enter judgment for the plaintiff, or for a new trial, by way of appeal from the decision of Hawkins, J.

The action was brought to recover damages for an alleged libel contained in a report of certain proceedings before three justices at the Guildhall, Canterbury, which report was sent by the defendants to the editors of several London newspapers, and published in those newspapers. The report was as follows:—

"Alleged Perjury by a Solicitor.—Mr. W. M. Thompson, barrister, applied at the Guildhall, Canterbury, to-day for a summons against Edmund Kimber, solicitor, of &c., for perjury alleged to have been committed in the Canterbury Bankruptcy Court in connection with some bankruptcy proceedings. The Bench acceded to the application."

The defendants admitted the publication of the report, and pleaded (inter alia) that the words complained of were a fair and accurate report of a judicial proceeding, and were published by the defendants, bonâ fide, for the information of the public, without any malice towards the plaintiff, and were therefore privileged.

At the trial before Hawkins, J., and a special jury, the clerk to the justices was called by the plaintiff to prove what took place at the hearing of the application for the issue of the summons for perjury, and it appeared from his evidence that the application was made on behalf of one Hasker; that it was made by counsel, ex parte, and without any evidence being given on oath; that the three justices who constituted the Court were called together by their clerk for the purpose of hearing the application; that they sat in the council chamber of the

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Guildhall, where it was their custom to transact their business; that no order to exclude the public was made; that a reporter, who was said to have furnished the defendants with the report, was present, and that what was stated in the report did in fact take place.

The justices granted a summons for perjury against the plaintiff, but dismissed it on the hearing.

At the close of the plaintiff's case the defendants offered no evidence, and the defendants' counsel submitted that upon the facts already proved the report was privileged, being a fair and accurate report of judicial proceedings before a competent tribunal acting judicially, and that there was no case to go to the jury. The plaintiff's counsel contended that the privilege did not attach, because the proceedings before the justices did not take place in open Court, and that there was evidence, which ought to have been left to the jury, that the report was unfair, inasmuch as it omitted to state the name of the applicant for the summons, or to state the name of the bankrupt in the bankruptcy proceedings referred to, so that persons reading it might suppose that the plaintiff himself was the bankrupt (which was not the case).

Hawkins, J., ruled that the report was privileged, declined to leave the question of unfairness to the jury, and directed a verdict for the defendants, and gave judgment for them. The plaintiff appealed.

Candy, Q.C., and *J. E. Fox*, (*Alan Macpherson*, with them), for the plaintiff. The defendants do not claim privilege under the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), as proprietors or publishers of a newspaper. They are in the same position as any member of the public who had been present during the proceedings before the justices, and had published a report defamatory of the plaintiff. Under such circumstances the right to publish depends upon the right to be present as one of the public. The public had no right to be present at the hearing of the application for a summons in this case. Sect. 19 of 11 & 12 Vict. c. 42, enacts that the room or building in which justices shall take examinations of witnesses on the hearing of a summons for an indictable offence "shall not be deemed an

open Court for that purpose," and the section proceeds to give the justices a discretion to exclude the public. A fortiori the public have no right to be present on an ex parte application for the issue of a summons. The legislature has clearly recognized that no public right to be present ought to exist where the proceedings before the justices are only preliminary. This is shewn by contrasting the provisions of s. 12 of 11 & 12 Vict. c. 43, which enacts that, on the hearing of complaints and informations which can be dealt with summarily, i.e. where there is a final decision of the matter before the justices, the room or place in which they sit "shall be deemed an open and public Court, to which the public generally may have access." There was no final decision in any technical sense in the proceedings on the application for a summons for perjury. The application, being made ex parte, need not result in any final decision. The decision in *Lewis* v. *Levy* (1), which may be relied on for the defendants, does not bind this Court; and, further, the case is distinguishable because the proceedings were on the hearing of a summons and must necessarily result in a final decision. Nor is *Curry* v. *Walter* (2) binding upon this Court, and it may be observed that the proceedings were unquestionably in an open Court. In *Usill* v. *Hales* (3) Lord Coleridge, C.J., considered he was bound by *Lewis* v. *Levy* (1); otherwise, it appears from the expressions he used in his judgment, he would have held that the publication of a report of proceedings, upon an ex parte application for the issue of a summons under the Master and Workman's Act, was not privileged.

Next, assuming the proceedings here were in open Court, and the publication of the report was primâ facie privileged as being a report of judicial proceedings, the learned judge ought to have left to the jury the question whether the report was fair and accurate. The onus is on the defendant to justify the publication of defamatory matter, and he must prove all the circumstances necessary to establish his justification: *Stevens* v. *Sampson* (4), judgment of Brett, L.J., at p. 56. It was, therefore, for the defendants to prove that the report was a fair and accurate account

(1) E. B. & E. 537.
(2) 1 B. & P. 525.
(3) 3 C. P. D. 319.
(4) 5 Ex. D. 53.

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of what took place. It did not profess to be a verbatim report, and there was some evidence of unfairness for the jury in view of the omissions complained of at the trial. In *Milissich* v. *Lloyds* (1), Brett, L.J., said that, when it was not absolutely certain that what was omitted could not affect the mind of a reasonable man, then it was for the jury to say whether it could or not. It is submitted that the omissions in the present case were such as might affect the mind of a reasonable man, and the question should have been left to the jury.

Blake Odgers, (*Murphy*, *Q.C.*, with him), for the defendants. As to the question whether the case ought to have been left to the jury, the omissions complained of were immaterial. It was admitted that everything stated in the report was true; no evidence was given to lead the jury to suppose that, if the name of the applicant for a summons had been stated, it could have made any difference in the mind of any reasonable man who read the report, and no reasonable man reading the report would suppose that the bankruptcy proceedings mentioned in it were proceedings in the bankruptcy of the plaintiff himself. It is submitted that the privilege arises as soon as it appears that the report is a report of judicial proceedings in open Court. The onus then lies upon the plaintiff of shewing that it is not a fair and accurate report; but, if this be not so, the defendants were entitled to rely upon the evidence given in support of the plaintiff's case, and upon the authority of the *Capital and Counties Bank* v. *Henty* (2), the learned judge was right in declining to leave the case to the jury.

[He was stopped.]

LORD ESHER, M.R. I am of opinion that this appeal must be dismissed. The question is whether what the defendants did was privileged by law. The rule of law is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open Court, then the publication, without malice, of a fair and accurate report of what takes place before that tribunal is privileged. Under certain

(1) 46 L. J. (C.P.) 404; 36 L. T. R. (N.S.) 423.

(2) 5 C. P. D. 514; 7 App. Cas. 741.

circumstances that publication may be very hard upon the person to whom it is made to apply, but public policy requires that some hardship should be suffered by individuals rather than that judicial proceedings should be held in secret. The common law, on the ground of public policy, recognizes that there may be greater danger to the public in allowing judicial proceedings to be held in secret than in suffering persons for a time to rest under an unfounded charge or suggestion. That being so, does the present case come within the rule which I have stated? An application was made to the magistrates for the issue of a summons, against the person who is now plaintiff in the action, on a charge of perjury. Now the magistrates undoubtedly had jurisdiction to entertain such an application. They were undoubtedly a properly constituted tribunal having jurisdiction to consider and determine whether or not the summons should be issued. The issue of the summons was, therefore, a judicial proceeding, and the consideration of whether or not it should be issued was a judicial proceeding, and a judicial proceeding by a properly constituted tribunal. So far, therefore, the case is brought within the rule. It was said, however, that, although this was a judicial proceeding before a properly constituted tribunal, having jurisdiction, and acting judicially, it was not a judicial proceeding held in open Court. The statute 11 & 12 Vict. c. 42, was relied on, and it was said that s. 19 enacts that, when magistrates are dealing with such a matter as this, they are not sitting in open Court. But, first of all, s. 19 does not apply at all to an application for the issue of a summons, and, therefore, cannot be relied on. It was said that at a later part of the proceedings when the summons had been issued and was before the Court for hearing, s. 19 provided that the Court or room in which the magistrates sat should not "be deemed to be an open Court," and that it would be ridiculous if the Court or room were to be deemed an open Court when the application for the issue of the summons was heard. I cannot see that. Nor can I agree with the meaning sought to be given to the section. All that it says is that "the room or building in which such justice or justices shall take such examinations and statement as aforesaid shall not be deemed to be an open Court for that purpose; and it

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shall be lawful for such justice or justices, in his or their discretion," to order the Court to be closed to the public. Having regard to the fair meaning of the enactment it is obvious from the second part that the justices have a discretion whether they will allow the public to be in the Court or not. They may, or they may not, abstain from preventing the public from remaining there. The only meaning of the section is that the Court is not to be deemed to be an open Court if the justices exercise their discretion by ordering it to be closed to the public; but, if it is not so closed by the order of the justices, then it is an open Court. As I have already said, s. 19 has no application to the case of an application for the issue of a summons. You have, therefore, only to consider the first section of the statute which provides that "in all cases it shall be lawful for such justice or justices to whom such charge or complaint shall be preferred, if they or he shall so think fit, instead of issuing in the first instance his or their warrant to apprehend the person so charged or complained against, to issue his or their summons directed to such person, requiring him to appear before the said justice or justices, &c." Therefore, under that section, the justices are acting judicially in a judicial proceeding in considering the application for the issue of a summons, and by the law of England the proceeding must be in open Court. No order to close the Court was made by the justices in the present case, and it is clear that the proceedings were in open Court.

Next, it is said that, though the proceedings were judicial proceedings in open Court, no account, however true, of what took place can be published until the justices have given a final decision. Having regard to the cases, that is not the correct way of stating the rule, because it has been held that where there are proceedings before justices which may in the result arrive at a final decision, a true and fair account of those proceedings published without malice is privileged, although it be published before the final decision is arrived at. That, I think, is the effect of the judgment in *Lewis* v. *Levy*. (1) In the subsequent case of *Usill* v. *Hales* (2) it would seem that Lord Coleridge, C.J., had it not been for the decision in *Lewis* v. *Levy* (1), would have

(1) E. B. & E. 537. (2) 3 C. P. D. 319.

held that there must be a final decision before the publication of a report of the proceedings could be privileged, but when he came to examine the series of decisions on the subject he arrived at the conclusion that some of the earlier cases had really been overruled in later days, and acting upon the principles laid down in *Curry* v. *Walter* (1) and *Lewis* v. *Levy* (2), he held that a fair and correct report of proceedings on an ex parte application to a magistrate for the issue of a summons under the Master and Workman's Act was privileged. Lopes, J., though he treated the opinion of the Lord Chief Justice with tenderness, came, I think, to the conclusion that the privilege applies to a fair and correct account of proceedings published before the final decision is arrived at, if in the end there must be a final decision. I think it must be so. If it were not, the ridiculous result would follow that, where the trial of a case of the greatest public interest lasted fifty days, no report could be published until the case was ended. I am, therefore, of opinion that where the proceedings are such as will result in a final decision being given, a fair and accurate report, made bonâ fide, of those proceedings is privileged, although it be published before the final decision is given. That being so, it is necessary to consider whether the proceedings on the application for the issue of a summons in the present case were proceedings which must end in a final decision. Now, if the magistrates refused to allow the summons to be issued, that would be a final decision of the matter. If they issued the summons there must be a further inquiry, and the matter might go on to trial. So that, at one stage or other of the proceedings, there must be a final decision of some kind or other. I therefore think that the proceedings on the application for the issue of a summons were proceedings which must result in finality of decision at one time or other. This case, therefore, is brought within the rule.

Next, was the privilege made out in other respects? For myself, I think that it lies upon the defendant, who claims privilege in respect of a report of proceedings in a Court of justice, to shew that the report was fair and accurate. The burden of proof lies upon him, but a person on whom the burden

(1) 1 B. & P. 525. (2) E. B. & E. 537.

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of proof lies may always, in order to discharge himself of that burden, vouch what is proved for him by his opponent. The question in the present case is, were the defendants entitled to say:—"It was unnecessary at the trial to substantiate our claim of privilege, because it was substantiated by the proof given in the case made by the plaintiff?" No malice on the part of the defendants was suggested. Was it proved at the trial that the report was fair and accurate? Now, the plaintiff called a witness who stated what had taken place before the magistrates. Then the alleged libel was read and put in. It is beyond question that everything stated in the report to have taken place before the magistrates did, in fact, take place; but the plaintiff's counsel, though he admitted that the report, so far as it went, was an accurate account of what did take place, contended that there were two material omissions which would entitle the jury to say that the report was not fair and accurate. First, it was said that the name of the applicant for the issue of the summons was omitted. But there was no evidence to shew that the applicant was a peculiar person, or that he was different from any ordinary applicant for a summons. No evidence was given of want of value in the applicant, and the judge had to deal with the matter on that footing. He thought that, under the circumstances, no sensible man could say that the omission of the applicant's name was a material omissiou. I also think that the omission was not material, and that no sensible man could be of opinion that the publication of the applicant's name could make any difference. Under those circumstances the judge was right in refusing to leave the question to the jury. Next, the omission of the bankrupt's name was relied on. It was said that anyone reading the report might come to the conclusion that it was in proceedings in the bankruptcy of the plaintiff himself that the alleged perjury was committed. The learned judge thought, and I agree with him, that no reasonable man could come to that conclusion. The result was that the plaintiff saved the defendant from proving that the report was fair and accurate, and relied on two omissions which were palpably immaterial—omissions which could not, in the mind of a reasonable man, render the report unfair. I think that the learned judge was justified in

saying that it was proved beyond doubt that the report was a fair and accurate account of what took place, and he was justified in refusing to ask the jury to find what no reasonable man could find. I am, therefore, of opinion that the report was privileged as a fair and accurate report of judicial proceedings in open Court. I think that this appeal should be dismissed.

LOPES, L.J. I agree with the judgment of the Master of the Rolls. In my opinion the learned judge at the trial was right, and this appeal ought to be dismissed. The rule of law, founded upon principles of public policy and convenience, is that no action for libel can be maintained in respect of a report of judicial proceedings, taken before persons acting judicially in open Court, where the report is a fair and accurate report of those proceedings and published without malice. I think that those requirements were strictly complied with in the present case. Application was made to the magistrates in the ordinary and proper way for the issue of a summons for perjury against the present appellant. The application came before them in the ordinary and proper way in a place where they usually sat for the performance of their duties as magistrates, and they had a discretion to grant or refuse it. It was argued that the application was not heard in open Court, and s. 19 of Jervis' Act (11 & 12 Vict. c. 42) was relied on as shewing that the Court for that purpose was not an open Court. The answers to that contention are: first, that s. 19 does not apply to an application for the issue of a summons or warrant at all; and, next, the effect of the section is only to give the magistrates a discretion whether they will, or will not, exclude the public. In the absence of any order to exclude the public the Court must be regarded as an open Court. I am, therefore, of opinion that the objection that this was a report of proceedings not taken in open Court fails. It was next urged that this was a proceeding, ex parte, and therefore the privilege would not attach. The cases of *Lewis* v. *Levy* (1) and *Usill* v. *Hales* (2) answer that contention, and I am of opinion that that point also fails. Then it was said that, in order that the privilege should attach, there must be a final decision before

(1) E. B. & E. 537. (2) 3 C. P. D. 319.

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a report of such proceedings as these is published. Now there may be some expressions in *Usill* v. *Hales* (1) which, if not looked at carefully, seem to favour that view. But, in my opinion, if the proceedings were such as must ultimately lead to a final decision there may be a report of those proceedings which is privileged. Take the case of proceedings which go on from day to day lasting for a long period. Can it be said that no report may be furnished to the public until the proceedings are finished? I think that the proceedings here were such as must ultimately result in a final determination. Another point taken was that, assuming the proceedings were before magistrates properly constituted, sitting in open Court, and having jurisdiction to entertain the application, the question should have been left to the jury whether the report was a fair, impartial, and accurate report of what took place. I agree that if there is any evidence of unfairness, it ought to be left to the jury; but, having regard to what took place at the trial, I think there was nothing which the judge could properly leave to the jury. The plaintiff's counsel was asked what omissions from the report he relied on as shewing that the report was unfair. He said, first, that the name of the applicant for a summons was omitted; and, secondly, that the name of the debtor in the bankruptcy proceedings was omitted. These two omissions were all he had to rely upon, and all that he could prove. It is clear, to my mind, that under those circumstances the judge was justified in saying that it was impossible for the plaintiff to make out that the report was not fair, impartial, and accurate. Acting, therefore, upon *Capital and Counties Bank* v. *Henty* (2) he held that it was impossible for the jury reasonably to find that the report was unfair, and he rightly held that it was privileged. For these reasons I think that this appeal fails.

KAY, L.J. I entirely agree, on grounds which, as the points raised are of importance, I would rather state in my own words. In the course of the argument the plaintiff's counsel said, and said very forcibly, that if the privilege claimed by the defendants in this case existed, it might happen that a man's character

(1) 3 C. P. D. 319. (2) 5 C. P. D. 514; 7 App. Cas. 741.

might be destroyed or injured by ex parte proceedings at which he was not present, of which he had no knowledge, supported by statements not made on oath, but made by counsel, which statements the person whose character was attacked had no opportunity of denying. In the present case the application for the issue of a summons for perjury was not supported by any sworn testimony whatever. Counsel was instructed to make the application, and did make it. Mr. Kimber was not present when it was made, and did not know of the proceedings. If the privilege which is claimed exists, it is essential for the safety of the community to guard it by very strict rules. The privilege must be closely examined in order to see that, in such cases as this, there is no injustice in holding that it does exist. The application for the issue of a summons was not made at the ordinary petty sessions, but it was made before three justices, called together by the justices' clerk, and sitting in the ordinary place in which they sat as justices. No application was made to them to close the Court by excluding the public, and they made no order to close the Court. It was an application made to magistrates who were required to act judicially in a judicial proceeding, and it was made to them sitting in the place in which they ordinarily sat as magistrates. The public were entitled to be there, and, as I understand, some of them were there. I am, therefore, of opinion that it was an open Court. What is the rule of law applicable under such circumstances? In *Lewis* v. *Levy* (1) Lord Campbell says: "We are not prepared to lay down for law that the publication of preliminary inquiries before magistrates is universally lawful; but we are not prepared to lay down for law that the publication of such inquiries is universally unlawful." Looking at that dictum alone, it does not necessarily follow from the facts I have stated that a report of this kind would be unlawful, or, indeed, that it would be lawful. I agree, however, that later decisions have gone much further; and I also agree that in the present case there is a possible hardship to the plaintiff in the publication of the report. But it is of such extreme importance that publicity should be given to all judicial proceedings that that consideration seems to me to

(1) E. B. & E. 537.

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outweigh what have been pointed out as the possible evils attending a publication of this kind. The matter is decided by the cases which have been referred to, and I have no doubt that the law now is that proceedings of this kind, although preliminary and ex parte, held in open Court, may be the subject of a fair and accurate report, and that such report is privileged if it be published without malice. During the course of the argument I was for a time inclined to think that, if it was proved that the proceedings were in open Court, and that the magistrates were acting judicially, the onus of proving that the report was fair and accurate might be shifted from the defendant, and that it might rest upon the plaintiff to shew that the report was unfair or inaccurate. But, upon consideration, I doubt that. In *Saunders* v. *Mills* (1), Tindal, C.J., said: "That which I am about to say will not interfere with the generally received doctrine that newspapers and other publications which narrate what passes in Courts of justice are to a certain extent privileged. No one can read their accounts of judicial proceedings without being sensible that on several occasions they do to a great extent serve the cause of public justice. They ought, therefore, to be privileged; but their privilege must be restrained to occasions in which they publish fairly what passes in the Court." I understand those words to mean that unless it be shewn, not merely that the publication was a publication of what took place in a Court of justice, but also that it was a fair and accurate publication, the privilege does not arise. I think, therefore, that the defendant must not only shew that the matter in respect of which the report was published took place in open Court, but also that his report of what did take place was fair and accurate. In the present case the plaintiff relieved the defendants from that onus in the way pointed out by the Master of the Rolls. Having regard to the evidence given at the trial on behalf of the plaintiff, and to the statement made by his counsel with respect to the omissions upon which he relied in order to shew that the report was unfair, I think the defendants were justified in relying upon that evidence as establishing that the report was fair and accurate, and that the learned judge was right in saying

(1) 6 Bing. 213.

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that, if those omissions were all that could be suggested, there was really nothing to go to the jury. It has been pointed out that this was not a case in which any suggestion of malice on the part of the defendants was, or could be, made. For these reasons, though I wish to treat a matter of this kind with the utmost jealousy, I am still of opinion that the course which the learned judge took was justified by the circumstances of the trial before him; that the report was privileged, and that this appeal should, therefore, be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *F. K. Bull.*

Solicitor for defendants: *A. M. Bradley.*

W. A.

[IN THE COURT OF APPEAL.]

C. A. 1892 *Nov.* 1.

HURLBATT AND ANOTHER *v.* BARNETT & CO.

Practice—Reference of Cause or Matter—Question in Dispute Consisting wholly or in part of Matters of Account—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 14 (*c.*)

Under the Arbitration Act, 1889, s. 14 (*c*), where any part of the dispute in a cause or matter relates to a matter of account, the cause or matter may be compulsorily referred, although in certain events it may become unnecessary to determine the matter of account.

APPEAL from an order of the Divisional Court dismissing an appeal from an order at chambers directing a reference of the cause to an official referee under the Arbitration Act, 1889, s. 14 (*c*).

The statement of claim alleged that, prior to September 4, 1890, Sawyer, Wallace & Co. carried on business as commission merchants in New York and elsewhere, and in the City of London, through their agent, W. L. Sawyer, who employed the defendants as sub-agents, and that the defendants in such capacity entered into contracts and transactions on behalf of the firm, and during the continuation of the sub-agency, and after the determination thereof on September 4, 1890, received sums of money to the use of the firm, a part of which had not been accounted for to the firm or the plaintiffs, who sued as being entitled to all the

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estate and effects of the firm, and claimed an account of all moneys received by the defendants in respect of the above-mentioned contracts and transactions.

The defendants, among other defences, alleged that under circumstances stated on the pleadings they were only bound to account (as they were willing to do) for moneys received by them before September 4, 1890, when it was alleged that their employment was wrongfully put an end to, and that they became personally liable on the contracts entered into but not completed before that date, and were not liable to give any account thereof.

The judge at chambers made an order to refer the cause to an official referee, and this order was affirmed by the Divisional Court.

The defendants appealed.

H. F. Boyd, in support of the appeal, contended that there was no jurisdiction to order a reference, as a dispute as to matter of account would not necessarily arise as there was no real disagreement between the parties in regard to transactions completed before September 4, 1890, and that if there was jurisdiction, the Court should not, in its discretion, order a reference which involved a trial of the preliminary question at what date the liability of the defendants came to an end. [He cited *Weed* v. *Ward* (1); *Clow* v. *Harper* (2); and *Knight* v. *Coales*. (3)]

Pollard, contrà. The Court has jurisdiction to refer where any part of the dispute is matter of account; and it is submitted that the discretion of the Court was rightly exercised as the claim involves questions of account arising after the termination of the authority, but out of contracts made prior to that time.

H. F. Boyd, in reply.

LORD ESHER, M.R. In this case the Divisional Court has directed the trial of the cause before the official referee, and in doing so has assumed to act under s. 14 (*c*) of the Arbitration Act, 1889. The defendants have appealed on the ground that the Court had no jurisdiction to make the order. This raises the question of what is the true construction of the sub-section.

(1) 40 Ch. D. 555. (2) 3 Ex. D. 198.
(3) 19 Q. B. D. 296.

The first observation I would make is that the Arbitration Act is an amending statute and not merely a consolidating one, and it was passed with full knowledge of the provisions of the Common Law Procedure Act, 1854, and the Judicature Act, 1873, bearing on the matter, and of the various decisions, one of which was *Weed* v. *Ward* (1), which appears to have placed a limitation on the view that might possibly have been taken of the operation of s. 56 of the Judicature Act, 1873.

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The true rule of interpretation where larger words are used in an amending Act than were used in the principal Act is that such larger words were used intentionally, and must have a meaning given to them accordingly. The limitation put on the power to refer under s. 56 of the Judicature Act, 1873, by the case which I have mentioned, was that unless it was shewn that a question of account must necessarily arise, there was no jurisdiction to refer the cause. Can we find any such limitation in the clause of the Arbitration Act that we are considering? The words of s. 14 (*c*) are, "If the question in dispute consists wholly or in part of matters of account," and by the enacting part, the Court or a judge may in such case order the whole cause or matter to be referred. Further, the word "mere," which occurs in the Common Law Procedure Act, 1854, s. 3, and is descriptive of the matter of account, is omitted, and also the words "which cannot conveniently be tried in the ordinary way." It seems to me that these words must have been omitted because the Legislature intended the power of the Court under the later statute to be larger than under the former.

The only meaning I can attach to s. 14 (*c*) of the Arbitration Act, is that, if the Court can see that part of the dispute between the parties is matter of account, that gives jurisdiction to refer the whole case. If there is a dispute as to what the contract between the parties is, and also a dispute as to the account between them, should it ever come to a matter of account, then part of the question in dispute is matter of account, and the jurisdiction arises. If that is correct, in this case there can be no doubt that there is a dispute as to a matter of account within the meaning of the statute, and therefore there was jurisdiction

(1) 40 Ch. D. 555.

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to make the order. If there was jurisdiction, there may still arise the question of discretion in exercising it. On this point a very good rule is laid down in *Knight* v. *Coales* (1), that "this discretion should be exercised with extreme caution, regard being had to the relative importance of that which is matter of account, as compared with that which is not. The matter of account giving the jurisdiction should not be incidental or subordinate to the other questions in dispute, but should be a substantial element to be decided in the action," and I take that really to mean that the Court ought to see that the dispute as to matter of account is a substantial part of the dispute between the parties. I do not go the length of saying that if there is a dispute as to what the contract is, and in one view of the contract no question of account would arise, the Court ought not, in the exercise of their discretion, to refer the cause; but I think the Court before doing so ought to see that the dispute is substantial, and not unlikely to be a matter of account. In this case it is clear that the Court had jurisdiction, and in my opinion it was rightly exercised, and the appeal must be dismissed.

LOPES, L.J. The question in this case arises under s. 14 (*c*) of the Arbitration Act, 1889, which was not merely a consolidation Act, but also an amending one. The section seems to embrace the jurisdiction to refer causes given by the Common Law Procedure Act, 1854, s. 3, and the Judicature Act, 1873, ss. 56 and 57, but with a material difference. In the Common Law Procedure Act, 1854, s. 3, the power to refer is given "where the matter in dispute consists wholly or in part of matter of mere account which cannot conveniently be tried in the ordinary way," while under s. 14 (*c*) of the Arbitration Act, the power is given "if the question in dispute consist wholly or in part of matters of account." There is therefore a material difference, and I cannot but think that it was an intentional difference, and that the Legislature had in view the decisions on the earlier Act, and that the jurisdiction is given where any part of the question in dispute is matter of account. If that is the true reading of the section this case is brought within it. As to

(1) 19 Q. B. D. 296, at p. 300.

whether the Court should, in its discretion, order a reference in this case, it seems to me, applying the rule laid down in *Knight* v. *Coales* (1) that the dispute as to matters of account in this case was a substantial element to be decided in the action, and that the discretion was rightly exercised.

KAY, L.J. I take the same view of s. 14 (*c*), of the Arbitration Act, 1889, which was passed to amend the law as to compulsory reference to arbitration contained in the Common Law Procedure Act, 1854, and the Judicature Act, 1873. It seemed to me at one time during the argument to be doubtful if, where, in any cause or matter, there was a preliminary question involving in itself no matter of account, and if that question were decided in a particular way no matter of account would arise, such a case was within the section so that the Court could refer the whole cause notwithstanding the existence of the preliminary question. I have come, however, to the conclusion that the words of the Act are large enough to include that case—that such a case comes literally within the words of the section, and that there would be jurisdiction to refer the whole matter. There was, therefore, jurisdiction to make this order, and, under the facts of the case, I have no doubt the discretion to do so was rightly exercised.

Appeal dismissed.

Solicitors for plaintiffs: *Freshfields & Williams.*
Solicitors for defendants: *Stibbard, Gibson & Co.*

A. M.

(1) 19 Q. B. D. 296, at p. 300.

C. A.
1892
Oct. 31.

[IN THE COURT OF APPEAL.]

DAVIDSON & ANOTHER *v.* CARLTON BANK, LIMITED.

Bill of Sale—Registration—"Schedule or Inventory therein referred to"—Specific Description of Chattels—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 2—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 4.

The grantor of a bill of sale, given as a security for an advance, was, at the time of the execution of such bill of sale, possessed of books to the number of 1800 volumes, which were in a study at his house.

The schedule annexed to the bill of sale commenced with the words: "The whole of the chattels at present at W. Vicarage, and consisting inter alia of the following." It then proceeded to specify the furniture and other chattels contained in each of the rooms in the house. Under the head "Study" was the item, "Eighteen hundred volumes of books as per catalogue."

There was a catalogue of the books in the study in existence previously to the bill of sale. There was no evidence of facts shewing that there was any difficulty in identifying the books comprised in the bill of sale without referring to the catalogue:—

Held, that the catalogue was not a schedule or inventory referred to in the bill of sale within the meaning of sub-s. 2 of s. 10 of the Bills of Sale Act, 1878, and therefore it was not necessary that it should be registered together with the bill of sale; and also that the books were "specifically described" in the schedule within the meaning of the 4th section of the Bills of Sale Act (1878) Amendment Act, 1882, inasmuch as the words "as per catalogue" were not restrictive of the previous part of the description, which sufficiently identified the books assigned.

APPEAL from the judgment of Cave, J., at the trial of an interpleader issue without a jury.

The plaintiffs, as grantees of a bill of sale, claimed certain goods which in March, 1892, had been taken in execution at the suit of the defendants. The grantor of the bill of sale, being the owner of certain furniture and other chattels, which were at his house, including books in the study to the number of 1800 volumes, on December 16, 1891, in consideration of an advance made to him by the plaintiffs, executed a bill of sale to the plaintiffs to secure the same. By the bill of sale the grantor assigned "all and singular the several chattels and things specifically described in the schedule hereto annexed." The schedule to the bill of sale began with the words: "The whole of the chattels at present at Westoe Vicarage, South Shields, and consisting inter alia of

the following." It then proceeded to specify the furniture and other chattels respectively contained in each room in the house. One of the headings was as follows:—"Study: Eighteen hundred volumes of books as per catalogue; writing-table and chair; four bookcases; Brussels carpet; small table; fender and fireirons."

It appeared that there was a catalogue of the books in the study in existence previously to the bill of sale, which, however, was not put in evidence at the trial. No evidence appeared to have been given of any extrinsic facts shewing that there was ambiguity in the description of the books assigned, or any difficulty in identifying such books without referring to the catalogue. The bill of sale with the schedule was registered, but not the catalogue of the books. It was contended for the defendants that the bill of sale was void as against them, because the catalogue of books referred to was not registered as well as the bill of sale and schedule annexed thereto. It was further contended that, so far as the books were concerned, the bill of sale was inoperative, because the books were not specifically described as required by s. 4 of the Bills of Sale Act (1878) Amendment Act, 1882. The learned judge ruled against the defendants on both points, and gave judgment accordingly for the plaintiffs.

Willis, Q.C., and *Colam*, for the defendants. The bill of sale is void altogether as against the defendants for default of registration, by reason of the provisions of sub-s. 2 of s. 10 of the Bills of Sale Act, 1878, which provides that the bill of sale must be registered "with every schedule or inventory thereto annexed or therein referred to." In this case, the catalogue of the books is an inventory referred to in the bill of sale; because the schedule is part of the bill of sale, and it refers to the catalogue.

[KAY, L.J. The words of the sub-section clearly shew that "referred to therein" means referred to by the bill of sale itself, not by the schedule.]

Secondly, the bill of sale is void so far as the books are concerned by reason of the provisions of s. 4 of the Bills of Sale Act (1878) Amendment Act, 1882, which provides that "every bill of sale shall have annexed thereto, or written thereon, a

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schedule containing an inventory of the personal chattels comprised in the bill of sale, and shall have effect only in respect of the personal chattels specifically described in the said schedule." The schedule contains no proper inventory of the books.

[LOPES, L.J. The Act requires an inventory of "the personal chattels comprised in the bill of sale." The question is whether there is not in this schedule such an inventory.

KAY, L.J. Apparently the contention for the defendants must go the length of saying that an inventory of books must be a catalogue.]

The books are not specifically described. It is not sufficient to say so many books. There ought to be a specific description of them, e.g., so many books by such an author, so many by another, and so on. It is contended, further, that the true construction is that the assignment is only of the books mentioned in the catalogue, and that a book which was in the study but not in the catalogue would not pass. In order to see what books are included, therefore, it is necessary to look at the catalogue. Consequently, there is no specific description in the schedule, and the books included cannot be identified except by reference to another document.

[They cited *Carpenter* v. *Deen* (1); *Witt* v. *Banner* (2); *Roberts* v. *Roberts* (3); *Hickley* v. *Greenwood*. (4)]

Herbert Reed, Q.C. (*Simey*, with him), for the plaintiffs. The inventory in the schedule to the bill of sale is sufficient, and these books are specifically described in the schedule within the meaning of the decisions on the subject. The result of the cases is that the description is sufficient if it is one by which the goods may be identified with reasonable certainty. The books assigned by this bill of sale could, under the circumstances, be identified with sufficient certainty by the description given and without looking to any other document. Having regard to the words at the beginning of the schedule, it is clear that the assignment was of all the chattels in the grantor's house, and therefore of all the books in the study at the date of the bill of sale; and it was not suggested at the trial that there were more

(1) 23 Q. B. D. 566.
(2) 20 Q. B. D. 114.
(3) 13 Q. B. D. 794.
(4) 25 Q. B. D. 277.

than eighteen hundred books in the study, or that there was any real difficulty in identifying the books in question. The words "as per catalogue" are mere surplusage.

[He cited *Cooper* v. *Huggins*. (1)]

[He was then stopped by the Court.]

Colam, in reply.

LORD ESHER, M.R. I think that the decision of the learned judge was correct. This bill of sale had a schedule, and that schedule contained an inventory, as required by the Bills of Sale Acts; and the bill of sale, with the schedule, was registered. So far as the registration is concerned, I do not think that there was anything not registered which ought to have been registered. But then it is said that the inventory was not a proper inventory. What are the facts? In this case the grantor was giving a bill of sale of some or all of his goods, and among the things which he intended to give, and the party advancing money intended to take, as security for the advance, were some books in his library. It seems to me clear upon the facts, as they appeared at the trial, that it must be taken that there were eighteen hundred volumes in this library which one party intended to give and the other to take as security for the loan. Then have they expressed this properly in the instrument? The assignment purports to be of the whole of the chattels at present at Westoe Vicarage, South Shields, including, among other things, eighteen hundred volumes of books in the study as per catalogue. Is the meaning that the grantor assigns eighteen hundred volumes of books described in the catalogue in the sense that he only assigns such books as are so described, or that he assigns all the books in the study, which are eighteen hundred in number, with the further statement that there is a description of them in a catalogue?

It seems to me that, on the undisputed facts of this case, the proper construction is that he assigns all the books in his library, which are eighteen hundred in number, with the statement that they are described in a catalogue. If so, the words "as per catalogue," are mere further description and are

(1) 34 S. J. 96.

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not wanted for the identification of the subject-matter assigned. It appears to me that this is a specific description of the books within the meaning of the Act, and that the inventory is a sufficient inventory, because it sufficiently describes the things assigned to prevent any difficulty in identifying them. There is nothing to shew that anybody concerned had any real difficulty in identifying the books which were intended to be assigned. The objection is, in truth, only a technical one, and it does not appear to me to be well founded.

LOPES, L.J. The first objection taken to the bill of sale was that the catalogue of the books referred to ought to have been registered. It seems to me clear that that objection must fail. The answer to it is contained in the terms of the 2nd sub-section of the 10th section of the Act of 1878, which says that "such bill with every schedule or inventory thereto annexed or therein referred to" shall be registered. In this case the schedule or inventory annexed to the bill of sale was registered, but the catalogue of books is neither annexed to the bill of sale nor referred to therein.

Then it was argued that there was another objection to the bill of sale, viz., that the description of the eighteen hundred volumes of books is not sufficiently specific, and therefore does not satisfy the requirements of the 4th section of the Act of 1882. It was argued, that, although an assignment of the whole of the books in the study being eighteen hundred in number, might be unobjectionable, nevertheless the description in this case was insufficient, because the words "as per catalogue" were restrictive of the previous description. I know of no better statement of what constitutes a specific description for this purpose than that which we gave in *Carpenter* v. *Deen.* (1) In that case I said: "The section requires that the chattels shall be 'specifically described.' According to my view, that means described with such particularity as is used in an ordinary business inventory of such chattels." Fry, L.J., said in that case: "In considering the meaning of the words 'specifically described,' we should look at the scope and object of the section. They are in my opinion

(1) 23 Q. B. D. 566.

plain. I think they are to facilitate the identification of the articles enumerated in the schedule with those found in the possession of the grantor—that is to say, to render the identification as easy as possible, and to render any dispute as to the intention of the parties as rare as possible, and to shut the door to fraud and controversy, which almost always arise when general descriptions are used. That is to be done as far as possible; by which I mean, as far as is reasonably possible—so far as a careful man of business trying to carry the object of the Act into execution could and would do without going into unreasonable particulars." It appears to me that the description given in this case satisfies the requirements of the Act as explained in that case. We find that the schedule is headed "the whole of the chattels at present at Westoe Vicarage, consisting of the following": and then follows, among other things, the item of eighteen hundred books in the study, as per catalogue. It seems to me that the words "as per catalogue" are not restrictive, but are a mere further description. For these reasons I think the appeal must be dismissed.

KAY, L.J. I am of the same opinion on both points. The first point taken is that the catalogue, having been referred to in the schedule, ought to have been put on the register. This contention is based on the 2nd sub-section of s. 10 of the Act of 1878. But, as Cave, J., says in his judgment, the phraseology of the enactment sharply distinguishes between the bill of sale itself and a schedule annexed thereto, and shews that to bring the case within it the reference to the inventory must be in the bill of sale itself, and not in the schedule thereto.

A greater difficulty arises with regard to the second point taken. By the 4th section of the Act of 1882, it is rendered necessary that there should be annexed to the bill of sale a schedule containing an inventory of the chattels assigned, and that such chattels should be specifically described therein. The meaning appears to me to be that there shall be annexed to the bill of sale a schedule, which shall contain a description of the chattels sufficiently specific to enable any person, taking the schedule in his hand and applying it to the subject-matter, to identify the

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chattels assigned without the aid of any other document. If it could be made out in this case that these books could not be identified without looking at the catalogue, I should say that the description would not be sufficient. But in the present case I come to the conclusion that the description was sufficiently specific to enable the books to be identified without referring to the catalogue. I had at first some doubt how the words ought to be construed; but in the result I construe them as follows. The schedule begins with the words, "The whole of the chattels at present at Westoe Vicarage, South Shields, and consisting inter alia of the following." There is no question that the intention was to pass the whole of the goods in that house at that time. In these words we have the governing intention; and we must construe the words of the inventory that follows by the light of that general description. Then, when we come to the inventory, we have these words: "Study: Eighteen hundred volumes of books as per catalogue." Does that mean all the books in the study amounting in number to eighteen hundred, or does it mean all such books in the study as are included in the catalogue? If the former is the correct construction, then I think that the description is sufficient, because without looking at the catalogue it is possible to determine which were the books in the study at the date of the bill of sale. The further reference to the catalogue is a mere additional description. I think that the real meaning of the schedule is that the grantor assigns all the books in his study, which he goes on to say, by way of additional description, are eighteen hundred in number and are mentioned in a catalogue. For these reasons I think that the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Le Riche & Stephens.*
Solicitor for defendants: *E. C. Rawlings.*

E. L.

THE APOTHECARIES COMPANY *v.* JONES.

1892
Nov. 2, 11.

ical Practitioner—Penalty—Practising without Certificate—Attendance on several Patients—Whether more than one Penalty Recoverable—"Act or Practise as an Apothecary"—"Every such Offence"—Apothecaries Act, 1815 (55 *Geo.* 3, *c.* 194), *s.* 20.

y the Apothecaries Act, 1815 (55 Geo. 3, c. 194), s. 20, any person who ll "act or practise as an apothecary" without a certificate is liable to a alty "for every such offence."

ne defendant practised as an apothecary without a certificate, and gave ical advice and supplied medicine to three different persons at different es on the same day. He was sued for three penalties.

Held, that the words "act or practise as an apothecary" were directed inst an habitual or continuous course of conduct, and the defendant was not ty of a separate offence in attending each of the three persons, and was only le to one penalty.

APPEAL by the plaintiffs from the decision of the judge of the nty court at Derby in two actions brought by the plaintiffs inst the defendant to recover two penalties of 20*l.* for having ed and practised as an apothecary without having obtained a tificate, contrary to the Apothecaries Act, 1815 (55 Geo. 3, 94), s. 20, by which, "If any person shall act or practise as apothecary without having obtained such certificate as aforeI, every person so offending shall for every such offence forfeit pay the sum of 20*l.*, and if any person shall act as an assist to any apothecary to compound and dispense medicines, hout having obtained such certificate as aforesaid, every son so offending shall for every such offence forfeit and pay sum of 5*l.*," the penalties, by s. 26, being recoverable by ion in the name of the Society of Apothecaries in cases ere the penalty exceeds 5*l.*

The facts were as follows. On May 6, 1892, three persons, ned Newman, Eaton, and Page, called on the defendant, who i not obtained a certificate under the Apothecaries Act, at erent times on the same day, and consulted him with respect alleged ailments, and the defendant gave medical advice and plied medicines to each of the three persons. The plaintiffs ught three actions to recover three penalties of 20*l.* each in

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respect of the attendance by the defendant on each of the three persons. In the first case tried the county court judge gave judgment for the plaintiffs; but in the second and third cases he gave judgment for the defendant, holding that the several acts and attendances constituted but one offence under the statute, and, therefore, only one penalty could be recovered.

The plaintiffs appealed from the judgments in the second and third actions.

Nov. 2. *Houghton*, for the plaintiffs, in support of the appeal. The judgment of the county court judge proceeds on a mistaken view of the meaning of the statute. If the offence had been described merely as "practising," the view taken might have been supported; but the words are "act or practise," and the judgment fails altogether to give effect to the word "act." In treating each separate patient the defendant acted as an apothecary. Again, a penalty is imposed "for every such offence," that is, for each act of prescribing for a patient. The learned judge appears to have been influenced by the observations of Lord Tenterden in *Apothecaries Co.* v. *Bentley* (1), but that was only the expression of a doubt, and the point now raised was not decided in that case, and never has been decided. Decisions on other statutes containing different language are not authorities as to the construction of this statute. [He referred to *Reg.* v. *Mathews* (2); *Marriott* v. *Shaw* (3); *Crepps* v. *Durden* (4); *Brooke* v. *Milliken* (5); *Apothecaries Co.* v. *Warburton* (6); *Apothecaries Co.* v. *Greenough* (7); *Apothecaries Co.* v. *Burt* (8); *In re Hartley* (9); *Garrett* v. *Messenger* (10); *Milnes* v. *Bale* (11); *Apothecaries Co.* v. *Nottingham* (12); *Gordon* v. *Williamson.* (13)]

The defendant did not appear.

Cur. adv. vult.

(1) 1 C. & P. 538.
(2) 10 Mod. 26.
(3) Com. 274.
(4) Cowp. 640; 1 Sm. L. C. 9th ed. p. 692.
(5) 3 T. R. 509.
(6) 3 B. & A. 40.
(7) 1 Q. B. 799.
(8) 5 Ex. 363; 1 L. M. & P. 405.
(9) 31 L. J. (M.C.) 232.
(10) Law Rep. 2 C. P. 583.
(11) Law Rep. 10 C. P. 591.
(12) 34 L. T. (N.S.) 76.
(13) [1892] 1 Q. B. 616; reversed [1892] 2 Q. B. 459.

Nov. 11. The following written judgments were delivered :— 1892

APOTHECARIES COMPANY v. JONES.

POLLOCK, B. This is an appeal from a decision of the judge of the Derby County Court in an action brought by the Apothecaries Company against the defendant to recover penalties for his practising as an apothecary without a certificate.

By the Apothecaries Act, 55 Geo. 3, c. 194, provisions are made for the education, examination, and admission of apothecaries; and by s. 20 it is enacted that, "if any person shall act or practise as an apothecary in any part of England or Wales without having obtained such certificate as aforesaid, every person so offending shall for every such offence forfeit and pay the sum of twenty pounds."

The plaintiffs sued the defendant in three actions to recover three penalties for three alleged offences, in attending, advising, and prescribing, and supplying medicines to, three different patients, on three separate occasions on the same day. In the first case one Newman, having complained to the defendant of a pretended pain in his throat, the defendant examined him, and gave him some medicine and pills. Similar evidence was given in two other cases. The judge held that these acts and attendances constituted but one offence under the statute, and imposed only one penalty. In the other two cases he gave judgment for the defendant, upon the ground that only one offence had been committed.

The judge, after finding against the defendant upon the facts, dealt very fully with the law of the case. With respect to the point raised before us, he said: "The question I have to determine is whether under these words the advising and prescribing for these three persons consecutively under the circumstances stated constitutes three offences or one offence? The words of the Act appear to me to point rather to an habitual, or, at all events, a continued course of conduct, than to an isolated act as constituting the offence. I have pointed out in my observations in the first case that in my opinion there was evidence that the treatment of Newman was a part and a particular instance of an habitual or at all events a continued course of conduct on the part of the defendant, and consequently that an offence within the meaning of the Act was proved."

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The judge then alludes to the cases decided under the Apothecaries Act, which were cited before him and also before us, and which, as far as they go, are mainly in favour of the view taken by him. I should have been content, under these circumstances, to say no more than that I agree with what is said by the judge below, but that during the argument, counsel for the appellant called our attention to the fact that in none of these decisions was the matter fully argued, and that they were founded, no doubt, in great measure upon the well-known judgment in the case of *Crepps* v. *Durden* (1), where it was held that a baker who sold a number of hot loaves on the same Sunday could not be convicted of more than one offence. The prescribing for and administering medicine to different patients, he argued, could not properly be compared to the selling of different rolls, especially as in the former case an offence against each separate patient would seem to be involved. There is no doubt great force in this remark, and it might afford a good ground for amending the provisions of the Apothecaries Act; but as that Act now stands, its provision as to the offence created by it is identical with that of the Sunday Trading Act. The language of the 29 Car. 2, c. 7, is: "Whoever shall *do* or *exercise* any worldly labour, business, or work of their ordinary calling on the Lord's Day," &c. That of the Apothecaries Act is: "If any person shall *act* or *practise* as an apothecary," &c. And both Acts go on to provide that every person so offending "shall for every such offence forfeit," &c. It appears to me, therefore, to be clear that, however the subject-matter and character of the offences created by the two statutes may differ, they are both directed against an habitual or continuous course of conduct, and not against an individual act, and therefore they ought both to receive the same construction.

The appeal, therefore, ought, in my judgment, to be dismissed, and with costs.

HAWKINS, J. I also am of opinion that the county court judge was right in the view he took, in holding that the advising and prescribing proved against the respondent constituted in law

(1) Cowp. 640.

but one offence, for which one penalty only was recoverable; and that consequently the respondent is entitled to our judgment.

Three separate actions were brought by the appellants against the respondent to recover, under the 20th section of the Apothecaries Act (55 Geo. 3, c. 194), three separate penalties of 20*l.*, by reason, as was alleged, that thrice in one day, namely, May 6, 1892, he had acted and practised as an apothecary, by giving advice and medicine to three persons, named Newman, Eaton, and Page, without having obtained a proper certificate entitling him so to do. In the first of these cases the learned judge gave judgment for the plaintiffs for the penalty of 20*l.* In the other cases he gave judgment for the defendant, upon the ground that, although either case might have been relied on to support an action, and all three cases might in either case have been proved as evidence of the defendant's infringement of s. 20, still, the three cases together formed but *one offence* in law, within the true meaning of that section. The material words of the section are as follows: "If any person shall act or practise as an apothecary without having obtained such certificate, every person so offending shall for *every* such offence forfeit 20*l.*" It may be convenient here to add that the same section imposes upon any unqualified person who shall *act as assistant* to an apothecary, to compound and dispense medicines, for every offence a penalty of 5*l.*

Were there no authorities to assist in forming a judgment upon the case, I can hardly suppose that, had the penalty been imposed merely for *practising* as an apothecary, it would have been seriously contended that a person could have been convicted of more than one offence, even though in the course of the same day 100 patients had been prescribed for. It could never have been in the contemplation of the legislature that each day during which a person illegally practised should be divided into hours or minutes, during each of which the heavy penalty of 20*l.* would be incurred; nor could it have been the intention of the legislature that each individual act of prescribing should be deemed such separate offence. To "practise" a calling does not mean to exercise it upon an isolated occasion, but to exercise it

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frequently, customarily, or habitually: see *Clark* v. *Reg.* (1), in which it was held that to render a person liable to be convicted of frequenting a public place with intent to commit a felony, it was not sufficient to prove that on one occasion only the prisoner was in the place with intent, but it ought to be shewn that he was there habitually; and though it is true each individual act would afford cumulative evidence of *practising*, yet bare proof of one individual act would not of itself amount to a "practising." The words of the section, however, are "act or practise"; it becomes therefore necessary to ascertain the meaning of the word "*act*," as there used. During the argument I was disposed to think the words "act" and "practise" were used synonymously, and I am not sure that this is not the correct view. Be that as it may, another interpretation may be given to the word, equally favourable to the defendant. It may be the word "act" was used in addition to "practise" to meet the case of persons who, without practising habitually as apothecaries, might nevertheless occasionally act as such. But here, again, the legislature could never have intended, and the language of the section does not force one to such a conclusion, that whilst a person habitually practising without a certificate could only incur *one* penalty each day he so practised, a person who did not habitually practise, and therefore was not so grave an offender, should nevertheless be liable to a separate penalty for every act of prescribing, without limit as to number; in other words, that twenty acts of practice in one day would, in the case of a person habitually practising, only constitute one offence, whereas against a much less persistent offender each act might be treated as a separate offence, and visited with a separate penalty. Applying the same considerations to the case of an assistant, it seems impossible to suppose that every act of assistance, e.g., the making of every pill or mixture, could be visited with a separate penalty of 5*l*. Good sense revolts at the idea of such a construction of the section.

Very few cases are to be found in the books directly touching the point under discussion, and in neither of them is the point actually decided. In *The Apothecaries Co.* v. *Bentley* (2) Lord

(1) 14 Q. B. D. 92. (2) 1 C. & P. 538.

Tenterden expressed his doubts "whether a fresh penalty attached for every acting as an apothecary towards each different patient, and whether more than one penalty attached for a continued practising as an apothecary, though the party attended different persons as patients."

In *The Apothecaries Co.* v. *Burt* (1) the question was again mooted, but it was not thought necessary for the Court to express any opinion upon it.

I must, however, observe, as a significant fact, that in no reported case since these doubts were expressed has more than one penalty been recovered, probably for the reason that it has been felt that Lord Tenterden's doubts were well founded.

The case of *Crepps* v. *Durden* (2) is a valuable authority for the respondent. It is true that case was determined upon the construction of another statute; but the grounds of the decision are applicable to the case before us. In *Crepps* v. *Durden* (2) the plaintiff had been convicted in four separate convictions for unlawfully exercising his ordinary calling of a baker by selling rolls on Sunday, November 10, 1776, contrary to the statute 29 Car. 2, c. 7, the words of that statute being "that no tradesman or other person shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord's Day." It was assumed that there were several sales by the plaintiff of rolls on the Sunday mentioned in the convictions; but it was urged that the nature of the offence was such that it could only be committed once on the same day, and that if the plaintiff had continued baking from morning till night it would still be but one offence. The Court held that this was so; and, in giving judgment, Lord Mansfield stated as the ground for it that "the *offence* is exercising his ordinary trade upon the Lord's Day; and that, without any fractions of a day, hours, or minutes. It is but one entire offence, whether longer or shorter in point of duration; so whether it consist of one or a number of particular acts, the penalty incurred by this offence is five shillings. There is no idea conveyed by the Act itself that if a tailor sews on the Lord's Day every stitch he takes is a separate offence, or if a shoemaker or carpenter work for different customers at different

(1) 5 Ex. 363. (2) 1 Sm. L. C. 9th ed. p. 692.

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times on the same Sunday, that those are so many separate and distinct offences. *There can be but one entire offence on one and the same day.*" Suppose, for a moment, the 20th section had stated in so many words that which is clearly the meaning of it, "if any person shall *on any day in the week* act or practise," &c., it would have required some ingenuity to distinguish the present case from *Crepps* v. *Durden.* (1)

The same reasons which guided the Court in *Crepps* v. *Durden* (1)—viz., that *the offence* created by the statute can alone be made the subject of conviction—the overt acts done in the commission of that offence are but so many pieces of evidence—had already been acted upon in the cases of *Marriott* v. *Shaw* (2) and *Reg.* v. *Mathews* (3), in proceedings to recover penalties under statute 5 Anne, c. 14, s. 4, which forbade the keeping by unqualified persons of dogs and engines for the destruction of game. It was there sought to recover a separate penalty for each hare killed; but it was decided that, the *offence* being the keeping and using of the dogs for the forbidden purpose, only one offence could be committed on the same day, and that the number of hares killed was immaterial. It was said by the Court in that case: "If a man not qualified go a hunting and kill never so many hares upon the same day, he would forfeit but one five pounds, for it is but one offence." This may be further illustrated by taking the case of two men charged each with using a gun to kill game without a licence; if they shot through a whole day from morning till night each would be guilty of one offence only, and each separate use of the gun by firing a shot would not constitute a separate offence. If it were otherwise, a man who fired twenty shots would incur penalties amounting to 100*l.*, whilst one who for want of opportunity only fired one shot would only subject himself to a fine of 5*l.*

None of the cases cited need comment beyond that which I have already made.

I do not wish it to be understood that in cases arising under the Act now under consideration the fact that an uncertificated person on two separate days prescribed and made up medicine

(1) 1 Sm. L. C. 9th ed. p. 692. (2) Com. 274.
(3) 10 Mod. 26.

for different persons would *necessarily* justify a conviction for a separate offence on each day, for it is not difficult to imagine cases in which acts of prescribing and making up medicine on several closely following days might taken together afford abundant evidence of practising. No such conclusion could fairly be drawn if the acts of each day had stood alone. Again, even though a patient be attended by a person clearly practising as an apothecary, it does not follow that because the attendance, prescription for, and supply of medicine to such patient had extended over two whole days or parts of two days two offences must *necessarily* have been committed. Take the case of a patient to whom in a case of urgency an unqualified person had attended continuously, say, from 10 P.M. on one day to 10 A.M. on the following. Under such circumstances I should think one offence only would be committed, for all would be one continuous action.

This view might be further illustrated by supposing a case of night poaching, where the offender commenced his offence at 11 P.M. and continued it till 2 or 3 A.M. the next day.

It is idle to attempt to lay down a golden rule upon the subject. Each case must depend upon the particular circumstances attending it. In the present case I have already said I think one offence only was committed, and I agree in the very sensible and sound judgment of the county court judge. The result is that I think this appeal should be dismissed with costs.

Appeal dismissed. Leave to appeal refused.

Solicitors for plaintiffs: *Upton, Atkey, & Upton, for Johnson & Co., Birmingham.*

P. B. H.

1892 FELLOWS AND OTHERS *v.* THE OWNERS OF THE "LORD STANLEY."
Nov. 17, 18.

Liverpool Court of Passage—Admiralty Jurisdiction—Rules for regulating Practice and Procedure—Rule empowering Registrar to give Summary Judgment—Invalidity—Prohibition—31 & 32 *Vict. c.* 71, *ss.* 10, 13, 23, 25—32 & 33 *Vict. c.* 51, *ss.* 1, 6.

In an Admiralty action in rem, brought in the Liverpool Court of Passage to recover wages, the registrar gave judgment for the plaintiffs, under a rule made by the assessor of the court, containing provisions similar to those of Order XIV. of the Rules of Supreme Court, 1883, and applying to Admiralty actions in rem, and giving the registrar power to enter judgment.

On an application for a prohibition:—

Held, that, as the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), (which by s. 25 gives Admiralty jurisdiction to the Court of Passage) and the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), are, by s. 1 of the later Act, to be read as one Act, and, as, by ss. 10, 13, and 23 of the earlier Act, jurisdiction to determine causes is conferred on the judge alone, the assessor had not power, under s. 6 of the later Act, to confer jurisdiction on the registrar to hear and determine the cause, and therefore the rule was invalid, and a prohibition must be granted.

MOTION for a prohibition to prohibit the enforcement of an order made by the deputy registrar of the Liverpool Court of Passage.

The action was an action in rem, brought by the plaintiffs, the crew of the *Lord Stanley*, to recover wages, and there was also a claim for double pay under s. 187 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104). Appearance having been entered by the mortgagee of the vessel, the plaintiffs took out a summons before the deputy registrar, under Number II. of the General Orders of the Court of Passage, 1882, made by the assessor of the court, which is as follows:—

"Whereas it is desirable in Admiralty actions brought in the said Court of Passage to recover a debt or liquidated demand in money upon a contract express or implied (as, for instance, for wages, necessaries or towage), or to recover damages, or unliquidated claims (as, for instance, for wrongful dismissal), or partly the one and partly the other, and the writ of summons has been specially indorsed with the particulars of the amounts sought to be recovered after giving credit for any payment or set-off, and default has been made in entering an appearance in such actions

within the time prescribed by the orders and rules in such cases, that the plaintiff should be at liberty to proceed at once to judgment, decree, and execution, I do hereby order that the registrar of the said court shall and may proceed to hear and determine, and shall and may hear and determine, the said actions, and assess the damages in the case of unliquidated claims, and make such orders, rules, and decrees therein as to him shall seem fit in the same manner, and as fully, as the assessor or other presiding judge of the said court could, or might, or can, or may, do. And whereas it is desirable in Admiralty actions in rem or in personam—both or either—brought in the said Court of Passage to recover a debt or liquidated demand in money, with or without interest, arising upon a contract express or implied (as, for instance, for wages, necessaries, towage, or payment of a liquidated amount of money), and the writ of summons has been specially indorsed with the particulars of the amount sought to be recovered, after giving credit for any payment or set-off, that the plaintiff shall be at liberty where the defendant appears to a writ of summons so indorsed, or where a third person by leave of the court intervenes in any such action, to apply for leave to enter up judgment or decree, and to issue execution thereupon as hereinafter mentioned, I do order that where an appearance has been entered to a writ of summons so specially indorsed as aforesaid, the plaintiff may on affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, call on the defendant, or such third person, to shew cause before the assessor or registrar why the plaintiff should not be at liberty to enter up judgment or decree for the amount so indorsed, together with interest, if any, and costs. A copy of the affidavit shall accompany the summons or notice of motion. The assessor or registrar may thereupon, unless the defendant or such third person as aforesaid, by affidavit or otherwise satisfy the assessor or registrar that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order, empowering the plaintiff to enter up judgment or decree

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accordingly, and to proceed to execution thereupon, as in ordinary cases in Admiralty actions in the said Court."

No affidavit of merits was produced before the deputy registrar, but it was objected that he had no jurisdiction to direct judgment to be entered for the plaintiffs without trial. The deputy registrar overruled the objection, and directed judgment to be entered for the plaintiffs for 22*l.* 6*s.* 10*d.*

The mortgagee thereupon took out a summons for a prohibition, which came on for hearing in the vacation before Barnes, J., who referred the matter to the Court.

J. D. Crawford, for the mortgagee, in support of the motion. The Admiralty jurisdiction of the Court of Passage, and the power to make rules, depend entirely on the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), and the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), which two Acts, by s. 1 of the Act of 1869, are to be read and interpreted as one Act. The Act of 1868 gives Admiralty jurisdiction to certain county courts, and by s. 10, "In an Admiralty cause in a county court the cause shall be heard and determined in like manner as ordinary civil causes are now heard and determined in county courts," with power in certain cases to call in assessors. This means that the cause is to be heard and determined by the judge sitting in Court. By s. 13, "The judge of every county court having Admiralty jurisdiction shall hear and determine Admiralty causes," &c. This expressly gives jurisdiction to the judge alone. By s. 23, "For the execution of any decree or order of a county court in an Admiralty cause the Court may order, and the registrar on such order may seal and issue . . . process." This shews that the order must be made by the Court, and distinguishes the registrar from the Court. By s. 25, on an Order in Council being made giving Admiralty jurisdiction to the Liverpool County Court, the Court of Passage is to "have the like jurisdiction, powers, and authorities as by that order are conferred on the said county court." (1) This is not a rule

(1) The Order in Council is set out in Williams and Bruce's Admiralty Practice, 2nd ed. p. 817.

regulating practice and procedure, but a rule dealing with jurisdiction, and conferring on the registrar the jurisdiction which the Acts confer on the judge alone. To this extent it purports to repeal the Acts.

Dr. Commins, for the plaintiffs, and *Pickford*, (*Joseph Walton*, *Q.C.*, and *W. F. Taylor*, with him), for the Mayor and Corporation of Liverpool, in opposition to the motion. There is nothing in any of the enactments referred to which can have the effect of invalidating this rule. It is a rule for regulating the "practice and procedure," within the meaning of s. 6 of the Act of 1869. The words used are wider than in *Speers* v. *Daggers*. (1) There the words in question were "practice and pleading." Sect. 6 of the Act of 1869 also contains the words "and for other purposes mentioned in s. 35" of the Act of 1868, and one of such purposes is "for regulating the duties of the judges and officers" of the Courts. If this rule confers jurisdiction on the registrar, it does not go further in that respect than the Rules of the Supreme Court, 1883, Order III., r. 6, and Order XIV., which, for the first time, gave jurisdiction to a master to make an order for judgment in an action for the recovery of land. Those rules are not part of a statute, being made under the powers given by the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 17, and the Supreme Court of Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 19, and they go further than the rule in the present case, for they deprive a defendant of the right to a trial by jury, which does not exist in Admiralty proceedings.

[The following cases were also cited: *Garnett* v. *Bradley* (2); *In re Mills' Estate, Ex parte Commissioners of Works and Public Buildings* (3): *Ind, Coope & Co.* v. *Emmerson*. (4)]

J. D. Crawford, replied.

LORD COLERIDGE, C.J. This case raises an important point; but, after hearing the argument, I have come to a clear conclusion. The question is whether the assessor of the Court of Passage had power to make the rule which has been the subject of discussion. The argument that he had such power depends on a

(1) 1 Cababé & Ellis, 503.
(2) 3 App. Cas. 944.
(3) 34 Ch. D. 24.
(4) 12 App. Cas. 300.

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number of statutes and on rules which have been made by the judges dealing with practice and procedure. It might be hard to say that the subject-matter of this rule is not covered by the word "procedure," and if I were driven to decide the case on that argument I should wish to take time to consider; but I am of opinion that I am not so driven. Order XIV., and the various statutes and rules which have been referred to as illustrating that argument, were dealing with an old established procedure, a matter that was familiar to the framers of the rules; whereas in the present case, the question is confined to the construction of two Acts of Parliament. The argument against the validity of the rule is short and clear, and I can see no answer to it. There are two Acts of Parliament, passed in 1868 and 1869, dealing with the Admiralty jurisdiction of county courts, and also giving Admiralty jurisdiction to the Court of Passage. By s. 1 of the later Act, it is expressly provided that the two Acts shall be read as if they were one Act. In the Act of 1868, ss. 10 and 13, we find two distinct enactments to the effect that the judge, and the judge alone, is to hear and determine Admiralty causes in county courts. It is clear from those two sections that the judge, and no one but the judge, has power to hear and determine such causes. Then s. 35 gives power to make general orders for regulating the practice and procedure of the Admiralty jurisdiction of the county courts. Sect. 25 of the same Act, for the first time gives Admiralty jurisdiction to the Court of Passage, which is to be the same jurisdiction as that conferred on the county court. It follows from the sections to which I have referred that it is the judge who is to exercise such jurisdiction. By s. 6 of the Act of 1869, which, as I have already pointed out, is to be read as one with the Act of 1868, power is given to the assessor of the Court of Passage to make general rules and orders for regulating the practice and procedure of the Admiralty and maritime jurisdiction in that Court. Suppose these two Acts were in form one Act, and there were a schedule, and it were provided that the Act should apply to all the courts named in the schedule, and various county courts were mentioned in the schedule, and also the Court of Passage; could it then be doubted that the power conferred by the Act on the judge of the

Court of Passage would be the same as, and neither more nor less than, that conferred by the same Act on the judges of the county courts? Could it be contended that, jurisdiction being given by the statute, power was also given by the same statute to alter that jurisdiction by a rule in direct contradiction to the terms of the Act? It is said that there is a difference in the present case, because by the later Act the assessor of the Court of Passage has a power which each county court judge has not. That may be so, but the question to be determined is whether, putting the two Acts together, a power is given to the assessor of the Court of Passage which it cannot be contended is given to the judges of the county courts. The Acts are to be read as one Act giving a statutory jurisdiction, and I fail to see how they can be read as giving power to repeal a part of the Act itself, and exercise the jurisdiction in a different way. The Court of Passage is, so far as Admiralty jurisdiction is concerned, a statutory court, and the assessor has statutory power, to be exercised according to the statutes, and there is nothing to shew that he has power to repeal a part of the very Act which gives him jurisdiction. It has been pointed out that if the power contended for exists it must exist without any limitation or control, a power which it is not suggested is anywhere given to county court judges, or even to the judges of the High Court, for the rules which they are empowered to make have to be laid before the Houses of Parliament, and are liable to be annulled. There is no such provision here, so that if the power contended for exists, the assessor of the Court of Passage may make any rule which he may think fit to make, without being subject to any control. That, in itself, is a very strong argument against the existence of the jurisdiction. I am aware that where the words of a statute are clear we ought to insist upon interpreting them according to their natural meaning, whatever the consequence may be, and I have always striven to uphold this doctrine; but the argument in favour of a construction which is in itself reasonable is strengthened, if it is shewn that any other construction will lead to unreasonable consequences.

For these reasons, I am of opinion that the prohibition must go.

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WILLS, J. I am of the same opinion, and have little to add. I think that Mr. Pickford's contention, that the words "practice and procedure" are large enough to cover this rule, is correct, so far as it relates to the application of the principle of Order XIV. Whether the words are large enough to cover the transfer of jurisdiction to the registrar, is another question. I wish to point out, as I pointed out in *Speers* v. *Daggers* (1), that the relative positions of the assessor and the registrar of the Court of Passage, are not at all analogous to those of a judge and a master of the High Court of Justice. The assessor of the Court of Passage occupies a somewhat anomalous position, and is not like a judge of the High Court. He has no jurisdiction in chambers, nor indeed any jurisdiction except that conferred by certain Acts of Parliament. Under them there is no appeal from the registrar to the assessor. Therefore, the analogy relied upon in support of the power to transfer the jurisdiction, is incomplete. It is not, however, necessary to decide this point, and I would rather leave it to be further considered in case any similar question should arise on any future occasion. In my opinion, the answer to Mr. Pickford's argument is to be found in the provisions of ss. 10 and 13 of the Act of 1868, by which the jurisdiction in Admiralty matters is given to the judge. This view is further supported by the provision in s. 23, that "the Court may order, and the registrar, on such order, may seal and issue process." The rule now before us amounts to a repeal of a part of the very Act, under and for the purposes of which the rule itself was made. It deals with the jurisdiction which the Act confers on the assessor, and transfers that jurisdiction to the registrar, and pro tanto it is a repeal of the Act. As to this part of the case I have no hesitation, and I therefore agree that the prohibition ought to be granted.

Motion granted with costs against the plaintiffs, but not against the Mayor and Corporation.

Solicitor for plaintiffs: *W. A. Tetlow, Liverpool.*

Solicitors for the mortgagee: *Pritchard, Englefield & Co., for Miller & Williamson, Liverpool.*

Solicitors for the corporation: *F. Venn & Co., for Atkinson, Town Clerk of Liverpool.*

(1) 1 Cababé & Ellis, 503.

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BUCKLEY *v.* CRAWFORD.
TOWNEND, CLAIMANT.

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Nov. 16, 21.

Arrest—Debtors Act—"Default in Payment of a Sum of Money"—32 & 33 *Vict. c.* 62, *ss.* 4, 5.

An order was made in interpleader proceedings that the sheriff should sell the goods seized and pay the claimant, the execution creditor undertaking to make good any deficiency on sale. There was a deficiency, and the master ordered that the execution creditor should pay the amount to the claimant. Default being made in payment, an order was made committing the execution creditor for contempt of court. There was no proof that he had means to pay:—

Held, that the case was one of default in payment of a sum of money, within the meaning of s. 4 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), and that an order of commitment could not be made.

APPEAL by the plaintiff from an order of commitment made by Bruce, J., at chambers.

The plaintiff Buckley had recovered judgment against the defendant Crawford, and issued execution. The goods seized were claimed by the claimant Townend, and the sheriff interpleaded. In the interpleader proceedings the master made an order under the Rules of the Supreme Court, 1883, Order LVII., r. 12, directing that the sheriff should sell, and pay the claimant, and further providing for the application of the proceeds of the sale. The order concluded with the words "the plaintiff undertaking to make good any deficiency on sale." The sheriff sold, and there was a deficiency, which was ascertained to amount to 139*l.* 0*s.* 10*d.* An order was made by the master directing the plaintiff to pay this amount to the claimant within four days. Default having been made by the plaintiff in compliance with this order, the claimant took out a summons for commitment, on which summons Bruce, J., made the order which was the subject of the present appeal. The plaintiff's affidavit denied the existence of means, and there was no proof of means.

Nov. 16. *C. C. Scott*, (*E. C. Robinson*, with him), for the plaintiff, in support of the appeal. There was no jurisdiction to

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make the order. The case comes within the words of the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4, by which "With the exceptions hereinafter mentioned no person shall be imprisoned for making default in payment of a sum of money," and none of the exceptions apply, and therefore by s. 5, sub-s. 2, no order could be made without proof of means; and by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 103, and the Orders of January 1, 1884, and March 4, 1885, made under that section (1), any order of the kind ought to be made by the judge to whom bankruptcy business is assigned. A reason for this is to be found in s. 103, sub-s. 5, by which under certain circumstances the judge, instead of committing, may make a receiving order, which a judge at chambers cannot do. The Rules of the Supreme Court do not provide for this mode of enforcing an order for payment: Rules of the Supreme Court, 1883, Order XLII., r. 3, 4, 6, 24. The authorities support the appellant's contention: *Hewitson* v. *Sherwin* (2); *Dillon* v. *Cunningham* (3); *Esdaile* v. *Visser* (4); *De Lossy* v. *De Lossy*. (5)

[WILLS, J., referred to *Linton* v. *Linton*. (6)]

Oswald, for the respondent. The order was rightly made. The plaintiff by giving this undertaking obtained the conduct of the sale, and now seeks to repudiate what is in substance a bargain with the Court. This amounts to contempt, which may be punished by attachment, just as a breach of an injunction may. None of the cases cited cover the point, and *Preston* v. *Etherington* (7) and *Bates* v. *Bates* (8) are in favour of the respondent.

C. C. Scott, in reply. *Bates* v. *Bates* (8) is distinguishable, for in that case a bond had to be given; otherwise the order would not have been made.

Cur. adv. vult.

Nov. 21. LORD COLERIDGE, C.J. We have come to the conclusion that there was no jurisdiction in this case to make the order for attachment, and it must therefore be set aside. My

(1) See Williams's Bankruptcy Practice, 5th ed. p. 280.
(2) Law Rep. 10 Eq. 53.
(3) Law Rep. 8 Ex. 23.
(4) 13 Ch. D. 421.
(5) 15 P. D. 115.
(6) 15 Q. B. D. 239.
(7) 37 Ch. D. 104.
(8) 14 P. D. 17.

learned brother will give our reasons, and comment on the authorities.

WILLS, J. In this case an application was made for an order to commit the plaintiff in the action for disobedience to an order which had been made directing him to pay a sum of money to the claimant in the interpleader. This was a simple order to pay money, but it is sought to treat the default in obeying the order as a contempt of court, on the ground that the order for payment was made in pursuance of an undertaking which had been given by the plaintiff. There is however no difference between an order to pay money made in pursuance of an undertaking and any other order to pay a sum of money. It is true that the undertaking is the original ground of the liability, but attachment is never granted except for disobedience of an order to do or abstain from doing some specific thing. Here the only order that could be made in pursuance of the undertaking is to pay the money. The words of the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4, shew that under such circumstances, if the case does not come within any of the exceptions mentioned, there can be no imprisonment for default in payment, for the money is due as a debt. There is abundant authority in support of this proposition.

In *Reg.* v. *Pratt* (1) an order had been made by Quarter Sessions for payment of costs, and it was held that, as the order could be enforced before a justice by warrant of distress, and in default of distress by warrant of commitment, the case came within the second exception in s. 4 of the Debtors Act, 1869, "Default in payment of any sum recoverable summarily before a justice or justices of the peace," and the person ordered to pay the costs was not protected from imprisonment. In giving judgment, Lush, J., said: "The words in the enacting part—default in payment of a sum of money—are advisedly used instead of 'debt,' in order to include cases which might not properly have been called cases of debt, such as costs on a judgment of nonsuit, or costs on a verdict for the defendant, or damages in an action of tort, or costs under a rule of court. The

(1) Law Rep. 5 Q. B. 176.

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enacting part therefore uses the words 'sum of money,' and this clearly applies to and includes costs; and the same expression in the second exception must also equally apply to costs." (1) It is clear from this passage that Lush, J., held that an order for payment of costs was primâ facie within the enacting part of the Act, and if it had not been within one of the exceptions the Act would have applied.

In *Hewitson* v. *Sherwin* (2), James, V.C., held that money payable for costs under an order of the Court was a debt within the meaning of the Act.

In *Dillon* v. *Cunningham* (3) the Court of Exchequer held that an order for payment, as distinguished from an order for commitment, might be made without proof of means, and, in giving judgment, Kelly, C.B., said: "It is quite clear the Act was intended to be of general operation, and to apply to every description of persons. The object was that there should be no imprisonment except for wilful default." (4)

In *Jackson* v. *Mawby* (5), where a defendant had been committed for contempt in not filing an answer, and after his committal had filed his answer, but had not paid the costs incident to his contempt, Hall, V.C., held that the effect of the Debtors Act was to take away from the Court the power of keeping him in prison because he had not paid the costs, and granted an order for his discharge.

In *Marris* v. *Ingram* (6) there is an elaborate discussion as to the meaning and effect of the provisions of the Act by Jessel, M.R., who expressed his opinion that the power of imprisonment which the Act reserves in the excepted cases was vindictive or punitive, and could only be exercised for the punishment of a dishonest debtor.

In the present case it is not shewn that the debtor is dishonest, and, therefore, the case falls within the words and the policy of the Act. The Act was passed for the express purpose of getting rid of the indefinite and often life-long imprisonment to which, under the old law, debtors were liable. I think I can

(1) Law Rep. 5 Q. B. at p. 182.
(2) Law Rep. 10 Eq. 53.
(3) Law Rep. 8 Ex. 23.
(4) Law Rep. 8 Ex. at p. 25.
(5) 1 Ch. D. 86.
(6) 13 Ch. D. 338.

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see how this order came to be made. A case seems to have been mentioned to Bruce, J., in chambers, in which an order for attachment was made by Charles, J., against a person named Harvey. I have heard what the circumstances of that case were from Charles, J., himself. He was satisfied on the affidavits that the person against whom he made the order had the money, and he treated the case as one of wilful default and dishonesty. No doubt the counsel who mentioned the case to Bruce, J., at chambers was not aware of this fact.

For these reasons I am of opinion that there was no jurisdiction to make this order for attachment, and that it ought to be set aside.

Appeal allowed.

Solicitors for appellant: *Burgoyne, Watts & Co.*

Solicitor for respondent: *Arthur Harris.*

P. B. H.

GOSLING *v.* GREEN.

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Nov. 4.

River—Navigation—Look-out on board Steam-vessel—By-laws—Inconsistency.

The 99th by-law made under the provisions of the Watermen's and Lightermen's Amendment Act, 1859, which requires the master or other person having the command or management of any steamboat navigated on the river Thames to cause a proper look-out to be kept from the bow of such steamboat, is not inconsistent with or repealed by the 36th by-law made under the provisions of the Thames Conservancy Act, 1864, which requires the master of every steam-vessel navigating the river to cause a proper look-out to be kept from the said steam-vessel during the whole time it is under way. Where, therefore, no look-out was, in fact, kept from the bow, and the captain was summoned and fined under the former by-law:—

Held, that the conviction was right.

CASE stated by a metropolitan police magistrate.

A summons had been taken out by the respondent Gosling, under the 99th by-law made under the Watermen's and Lightermen's Amendment Act, 1859, 22 & 23 Vict. c. cxxxiii., charging that the appellant, Green, on June 17, 1892, between Southwark bridge and Westminster bridge, being the master or person in charge of the steamboat *Rifleman*, did navigate the same without causing a proper look-out to be kept from the bow of such vessel,

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contrary to the by-law in that case made and provided. At the hearing before the learned magistrate, it was proved, and he found as a fact, that there was no person in the bow of the vessel on the day charged in the summons, and he convicted the appellant, and fined him in the sum of five shillings.

It was contended before the magistrate, on behalf of the appellant, that by-law 99 of the Watermen's and Lightermen's Amendment Act, 1859, was bad, being inconsistent with by-law 36, made under the Thames Conservancy Act, 1864 (27 & 28 Vict. c. 113).

By-law 99 of the Watermen's and Lightermen's Amendment Act, 1859, is as follows: "That if the master or other person having the command or management of any steamboat or vessel navigated as last aforesaid shall not (when practicable) remain, continue, and be on one of the paddle-boxes or on the bridge of such steamboat or vessel, or shall permit or suffer any other person except the crew of such steamboat or vessel to be and remain on such paddle-boxes, or on the deck cabins thereto adjoining, or bridge of such steamboat or vessel, or shall not cause and procure a proper look-out to be kept from the bow of such steamboat or vessel, he shall incur a penalty not exceeding five pounds. . . ."

By-law 36 of the Thames Conservancy is as follows: "The master of every steam-vessel navigating the river shall be and remain on one of the paddle-boxes, or on the bridge of such steam-vessel, and shall cause a proper look-out to be kept from the said steam-vessel during the whole time it is under way, and shall remove, or cause to be removed, any person other than the crew who shall be on the bridge or paddle-boxes of such steamer."

The question for the Court was, whether by-law 99 of the Watermen's Act was good and valid so far as regards the matter determined in this case.

Grain, for the appellant. The conviction was bad. It is sufficient compliance with by-law 36 under the Thames Conservancy Act, if a proper look-out is kept on a steam-vessel, in whatever part of the vessel that look-out may be kept; and there

is nothing in the case to shew that the look-out kept was not a proper look-out within the meaning of that by-law. By-law 99 under the Watermen's Act, is inconsistent with by-law 36 under the Thames Conservancy Act, which was passed five years later, and is repealed by it.

Avory, for the respondent, was not called upon.

POLLOCK, B. I am of opinion that this conviction was right, and should be affirmed. The charge is that the appellant navigated a steamboat without a proper look-out in the bow, contrary to by-law 99 of the Watermen's Act, and there is a finding by the learned magistrate that there was no person in the bow. It is said, however, that that by-law is no longer good and binding, and this is really the only question left to us by the magistrate. Now, under this by-law, which was made in pursuance of the provisions of the Watermen's Act, 1859, it is clear that two things are required; first, the master himself (or other person in command) is to remain on the paddle-box or bridge; and, secondly, there is to be a proper look-out kept from the bow; and this involves the necessity of two persons being on the watch or look-out while the vessel is being navigated. It is obvious that the by-law was drawn up with a double intention; in the first place, the protection of persons navigating craft on the river, and, in the second place, with a view of pointing out how that protection is to be arrived at; there is to be some other person on the watch besides the master. Then comes by-law 36 of the Thames Conservancy, made a few years later under the powers given by the Thames Conservancy Act, 1864, which provides that a proper look-out is to be kept from the vessel while under way; under that by-law it is clear that the look-out need not be kept from the bow, so long as it is a proper look-out; the proper look-out might be that of the master, or, at any rate, of some person in another part of the vessel than the bow. There being that apparent discrepancy between the two by-laws, it has been contended on behalf of the appellant that they are inconsistent, and that by-law 36 of the Thames Conservancy by implication repeals by-law 99 of the Watermen's Act.

Now it is quite clear that up to a certain point the two

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provisions are the same; in both of them the master (which term I use as including any person in command) is to be upon the paddle-box or bridge; but then comes a difference, the one by-law providing that a proper look-out shall be kept from the bow, the other merely that a proper look-out shall be kept. It seems hardly necessary to state the proposition, that when by an Act of Parliament or a by-law a new provision is made affecting the subject-matter of an earlier Act or by-law, there is no repeal by implication of the earlier one by the later unless the two are inconsistent. It cannot be said in the present case that there is an inconsistency; it may be perfectly right and necessary from the point of view of the Watermen's Company that there should be a look-out man in the bow, while the Thames Conservancy may be satisfied if a sufficient look-out is kept somewhere in the boat.

When the course of legislation is carefully looked at, the suggestion of the absurdity of there being two sets of provisions dealing with the same subject-matter loses its force. By the Thames Conservancy Act, which was passed five years after the Watermen's Act, the latter Act is in terms dealt with, and by a series of sections (s. 53 to s. 63) provisions are made which limit and alter the effect of the Watermen's Act, while, by s. 58, the provisions of the Thames Conservancy Act are to be read and have effect together with those of the Watermen's Act. The result is that the two Acts are to be read as one Act; certain sections of the earlier Act are repealed or varied, but the question arising under their by-law 99 is left undealt with. It is perfectly clear to me that this is not a question of mere language, but that it was the intention of the Act; the legislature did not intend that the Watermen's Act, or the by-laws made under it, should be varied or affected except as expressly provided.

HAWKINS, J. I am of the same opinion.

Judgment for the respondent.

Solicitors for appellant: *Arnold Williams & Co.*
Solicitors for respondent: *Ayton Safford & Kent.*

W. J. B.

MUNRO *v.* BALFOUR.

1892
Oct. 25.

(The East Manchester Election Petition.)

Parliament—Election Petition—Particulars—Scrutiny—Claim of Seat—Election Petition Rules, 1868, *rr.* 6, 7.

By r. 6 of the Election Petition Rules, 1868, "Evidence need not be stated in the petition, but the Court or a judge may order such particulars as may be necessary to prevent surprise and unnecessary expense, and to insure a fair and effectual trial in the same way as in ordinary proceedings in the Court of Common Pleas, and upon such terms as to costs and otherwise as may be ordered."

By r. 7, "When a petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, the party complaining of or defending the election or return shall, six days before the day appointed for trial, deliver to the master, and also at the address, if any, given by the petitioners and respondent, as the case may be, a list of the votes intended to be objected to, and of the heads of objection to each such vote . . . . and no evidence shall be given against the validity of any vote, nor upon any head of objection not specified in the list, except by leave of the Court or judge . . . ."

An election petition, after alleging the election to be void in consequence of various corrupt and illegal practices on the part of the agents of the sitting member, proceeded to claim the seat for the petitioner upon a scrutiny, upon the ground that he had a majority of lawful votes:—

Held, that rule 7 was exclusive of rule 6, and was alone applicable to the delivery of particulars under that part of the petition which claimed the seat, and that the Court had therefore no jurisdiction to order particulars other than those specified in the rule, or to enlarge the time for their delivery.

Elkins v. *Onslow: the Guildford Petition* (19 L. T. (N.S.) 528), distinguished.

Appeal of the respondent from the refusal of a judge at chambers to order the petitioner to deliver certain particulars of charges contained in so much of an election petition as claimed that upon a scrutiny the petitioner was entitled to the seat.

The petitioner and the respondent were the candidates at a parliamentary election for the Eastern Division of the borough of Manchester, at which the respondent was at the close of the poll declared to be duly elected. The petitioner presented a petition against the respondent's return, the first part of which alleged that the election and return of the respondent were null and void by reason of bribery, treating, intimidation, and undue

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influence on the part of his agents, illegal hiring and other illegal practices on their part, and general corruption. The petition then went on to allege that many persons had voted for the respondent who had been guilty of bribery, treating, or undue influence, or who had been bribed, treated, or unduly influenced, or were disqualified from voting, or had voted twice, or had been guilty of personation or illegal practices; that the respondent had only a colourable majority, and that upon a scrutiny these votes ought to be struck off, and the petitioner declared to have been duly elected. There were no personal charges against the respondent.

The respondent took out a summons for particulars, asking in substance for the names and numbers on the register of the persons alleged to have been guilty of the different offences charged in the petition, with the dates on and places at which the offences were committed, the names and numbers on the register of the persons bribed, treated, or unduly influenced, and the nature of the bribery, treating, or undue influence. The summons asked separately for particulars under each paragraph of the petition, following the language used in the petition, and substantially asked for the same particulars of the charges under the second part of the petition as of the charges under the first part. A judge at chambers made an order, as regards the first part of the petition (alleging the election to be void), that the petitioner should deliver the particulars asked for ten days before the day appointed for the trial of the petition, but as regards the claim of the seat in the second part of the petition he refused to order particulars to be delivered, on the ground that he had no jurisdiction to alter the time or the nature of the particulars required to be delivered under r. 7 of the Election Petition Rules, 1868. (1) The respondent appealed.

(1) By r. 6 of the Election Petition Rules, 1868 (see Rogers on Elections, 16th Ed., part 2, p. 775), "Evidence need not be stated in the petition, but the Court or a judge may order such particulars as may be necessary to prevent surprise and unnecessary expense, and to insure a fair and effectual trial in the same way as in ordinary proceedings in the Court of Common Pleas, and upon such terms as to costs and otherwise as may be ordered."

By r. 7: "When a petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of

Danckworts, for the respondent. The object of rule 7 was to prescribe a minimum of particulars to which the respondent should be entitled as regards the claim of the seat, and was not intended to prevent him from getting further particulars necessary to enable him properly to defend his seat. The particulars given under rule 6 are those of cases where there must have been agency, and where, therefore, the respondent's inquiries would be comparatively easily made; but in cases falling under rule 7 there may have been no agency, and the inquiries of the sitting member would be most difficult to conduct without full particulars; it is unreasonable therefore to suppose that he should be entitled to fewer particulars in the latter case than in the former. Rule 7 is not exclusive of rule 6; the two should be read together, and the provisions of rule 6 applied to that part of the petition which claims the seat upon a scrutiny; this was expressly decided by Willes, J., at chambers in the *Salford Petition* (1) and the *Guildford Petition*. (2)

Lewis Coward, for the petitioner, was not called upon.

LORD COLERIDGE, C.J. I am of opinion that this appeal should be dismissed. This is a petition which alleges that the election was void on the ground of bribery and various corrupt and illegal practices on the part of the respondent's agents, and also claims the seat for the petitioner as against the sitting member. As regards the first part of the petition, rule 6 distinctly applies, and the respondent is entitled to "such particulars as may be necessary to prevent surprise and unnecessary expense, and to insure a fair and effectual trial;" those particulars have been delivered, and under that portion of the petition the respondent

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lawful votes, the party complaining of or defending the election or return shall, six days before the day appointed for trial, deliver to the master, and also at the address, if any, given by the petitioners and respondent, as the case may be, a list of the votes intended to be objected to, and of the heads of objection to each such vote, and the master shall allow inspection and office copies of such lists to all parties concerned; and no evidence shall be given against the validity of any vote, nor upon any head of objection not specified in the list, except by leave of the Court or judge, upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs, as may be ordered."

(1) 19 L. T. (N.S.) 502.

(2) 19 L. T. (N.S.) 528.

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has got the particulars which he wants and to which he is entitled. But the petition does not stop there; it contemplates the possible failure of the charges which would avoid the election, and proceeds to claim the seat for the petitioner on a scrutiny, alleging that a number of votes sufficient to turn the majority had been given in favour of the respondent by persons who, for various reasons, were disqualified from voting. To that scrutiny it is admitted that rule 7 applies. If, on the scrutiny, the petitioner succeeds in striking off incriminated votes to the number of one more than the majority, of course the seat is lost, subject always to the right of the respondent to attack votes given for the petitioner and strike them off if possible; if he cannot do that, the result of the election will be other than it originally was declared to be. Now, it is admitted that rule 7 applies to that state of things, and by that rule six days before the trial the petitioner must deliver a list of the votes intended to be objected to and of the heads of objection to each vote. This rule, which I have summarized for convenience, seems to me to be a short, simple, and plain enactment, in effect an enactment by the legislature itself, dealing with the case where the petitioner asks for a scrutiny, and asks for the seat if the scrutiny is decided in his favour; the rule provides in the plainest terms that in attacking a vote he shall specify the vote attacked and the objection to it, and shall not, without leave of the Court, give any evidence against the validity of a vote unless those particulars are given. It is contended on behalf of the respondent that rule 7 does not impose any limitation upon the operation of rule 6, and that the generality of the language of the latter rule shews that it is to be extended to cases to which rule 7 appears exclusively to apply. If that contention is correct, it appears to me that rule 7 might as well be wiped out, and that every case might be treated as coming under rule 6, the particulars under which rule would cover those under rule 7. But, in my opinion, rule 7 applies to a particular set of cases, in respect of which it is exclusive; in other words, where that rule applies, rule 6 cannot apply. I wish to add that I should yield implicit deference to the opinion of that great authority, Willes, J., if it were in point in the present case; in my opinion, however, it clearly is not. It is

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true that the *Guildford Petition* (1) was a case of a claim of a scrutiny; but the petitioner further asked that, if in the course of the scrutiny anything should turn out which, if known previously, would have invalidated the election, then the election should be invalidated, although the claim of the petition was for a scrutiny only. Under those circumstances, Willes, J., thought that the petition contained matter which brought it within the operation of rule 6 as well as of rule 7. I need do no more than say that the facts of the present case are wholly different.

WILLS, J. I agree entirely with all that has fallen from my Lord, and have only one observation to add; that is, that the greater part of the argument on the part of the respondent went to shew that rule 7 ought to have been something different to what it is. I have no doubt, however, that the language of that rule received most careful consideration from its framers; it has the force of an Act of Parliament, and I agree with my Lord as to its true construction.

Appeal dismissed.

Solicitors for sitting member: *Pritchard & Englefield, for Boote & Edgar, Manchester.*

Solicitors for petitioner: *Torr & Co., for Hampson & Co., Manchester.*

(1) 19 L. T. (N.S.) 528.

W. J. B.

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Oct. 31;
Nov. 4.

RUSHMERE *v.* ISAACSON.

(THE STEPNEY ELECTION PETITION.)

Parliament—Election Petition—Particulars—Time for Delivery—Election Petition Rules, 1868, *r.* 6.

By rule 6 of the Election Petition Rules, 1868, particulars may be ordered of the charges contained in an election petition:—

Held, that there is no inflexible rule of practice as to the period before the day appointed for trial at which such particulars must be delivered; the time to be fixed for their delivery must depend upon the particular circumstances of each case.

Lenham v. *Barber* (*The Hereford Municipal Election Petition*) (10 Q. B. D. 293) distinguished.

APPLICATION by respondent by way of appeal from chambers asking that the time within which a judge had ordered delivery of particulars of the corrupt and illegal acts charged in the petition might be enlarged from seven days to ten days before the day fixed for the trial of the petition.

The petition charged various corrupt and illegal practices on the part of the respondent and his agent, and claimed that by reason of them the election was void; it then went on to demand a scrutiny, and claimed the seat for the petitioner on the ground that he had polled a majority of the legal votes. A judge at chambers, upon an application for particulars under rule 6 of the Election Rules (1), had ordered them to be delivered seven clear days before the trial of the petition. It appeared from the affidavits used in this application that the constituency was of considerable size, containing a population of about 60,000, with upwards of 7000 voters and 6000 houses, and that from 170 to 200 witnesses would probably be subpœnaed on the petitioner's side alone.

Lewis Coward, for the respondent. There is no inflexible rule of practice fixing the time for delivery of particulars at seven days before the trial; that time has sometimes been fixed, but in no case where the seat has been claimed for the petitioner has the time been limited to seven days. The Court has a discretion to allow what seems to it a proper time for the delivery of the

(1) See *Munro* v. *Balfour*, ante, p. 113.

particulars, having regard to such circumstances as the size and population of the constituency, the number of voters, the probable number of witnesses at the trial, and the number and nature of the charges made in the petition. Ten days were, in fact, allowed recently in the Manchester case: *Munro* v. *Balfour*. (1) The decision in the Hereford case (*Lenham* v. *Barber* (2)) is not against the respondent when properly considered; it was a municipal election petition in which fourteen days had been fixed for delivery of particulars, although the seat was not claimed, and the Court thought that seven days were sufficient; it is only an authority in the case of a similar small constituency.

Roskill, for the petitioner. It has been an inflexible rule of practice to limit the time to seven days in the absence of special circumstances, and there are no special circumstances in the present case. An alteration to ten days would in effect anticipate the scrutiny lists, and enable the respondent to get them at an earlier date than the statutory six days before the trial, as provided by rule 7 of the Election Rules. The Hereford case (2) is a strong authority in favour of limiting the time to seven days. (3)

POLLOCK, B. This application may perhaps be considered as of some importance, as our decision may possibly affect a rule of practice, if indeed there can be said to be a rule where each different case has its own different and distinguishing circumstances. The order made at chambers was that particulars should be delivered by the petitioner within seven days, and this is an application by the respondent to enlarge the time to ten days. I agree that the Court ought not to do this on a mere suggestion that the shorter time will inflict some inconvenience on the respondent. A priori, if this were an ordinary civil action, I think that the Court or a judge, looking at the number of witnesses and the large population of the constituency, would say that ten days was not an unreasonable time. But it must be

(1) Ante, p. 113.

(2) 10 Q. B. D. 293.

(3) It was agreed by the learned counsel in the case that the order for the particulars was to be confined to that part of the petition which sought to avoid the election, and was not to extend to the claim of the seat on the scrutiny.

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Pollock, B.

remembered that an election petition is an inquiry of a peculiar kind, and that if the inquiry into the allegations charged in the particulars, which, of course, must precede the inquiry proper or trial, is prolonged, considerable inconvenience may be inflicted and considerable temptation given to the suppression of awkward evidence; the question of the proper length of the preliminary inquiry must, it seems obvious, depend in each case on such circumstances as the character of the division, its area and population, and the number of witnesses it is proposed to call. It is clear that the case of Hereford, a small borough, which would be kept in a state of ferment until the trial of the petition was over, affords but a very slender analogy to the present case: Stepney is a large and populous division, and there is no reason to suppose that it would be greatly disturbed by the proceedings in connection with the petition. It is essential that time should be allowed the respondent to get up his case, and, if this were an isolated case, I cannot doubt that ten days would not be longer than would be reasonably necessary. Indeed, it is not the first occasion on which ten days have been given—it was done the other day in the Manchester case—and I have no doubt that what we are doing is very reasonable.

HAWKINS, J. I am of the same opinion.

Appeal allowed.

Solicitors for petitioner: *Baylis & Pearce.*
Solicitors for respondent: *Field, Roscoe & Co.*

W. J. B.

THE QUEEN *v.* McKELLAR. 1892

Nov. 1.

Parliament—Franchise—Registration—Lodger Claim—Declaration—Mistake—Power of Amendment—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-ss.* 2, 13.

A lodger claimed to be placed on the list of parliamentary voters in respect of the sole use of a bedroom and the joint use of a sitting-room with the landlord; the declaration annexed to the claim stating that he had occupied the lodgings partly as sole tenant and partly as joint tenant, and that the lodgings were of the clear yearly value, if let unfurnished, of 10*l.* or upwards. The revising barrister, being satisfied upon the evidence that the occupation of the bedroom alone was of the value of 10*l.*, amended both claim and declaration by striking out all reference to the joint tenancy:—

Held, that the description of the qualification was a "mistake" which the revising barrister had power to amend under s. 28, sub-s. 2 of the Parliamentary and Municipal Registration Act, 1878.

Rule nisi for a mandamus to the revising barrister for Exeter to state a case for the opinion of the Court.

Six persons had claimed to be placed upon the lodger list of parliamentary voters for the City of Exeter in respect of the occupation of certain lodgings, their qualifications being in each case described as the sole use of a bedroom and the joint use of a sitting-room with the landlord; the declaration annexed to the claim stated in each case that the claimant had occupied the lodgings partly as joint tenant and partly as sole tenant, and that the lodgings were of the clear yearly value, if let unfurnished, of 10*l.* or upwards. In consequence of the large number of lodger claims, the revising barrister had, with the consent of both sides, appointed a valuer to inquire into the value of all the lodgings in respect of which claims were made, from whose evidence he was satisfied that in these particular cases the occupation of the bedroom alone was of the annual value of 10*l.* The revising barrister, treating the description of the qualification as a mistake, amended the claims by striking out the latter part of the qualification relating to the joint use of the sitting-room, and amended the declarations by striking out the reference to occupation as joint tenant, and refused to grant a case. In another case a lodger had claimed only as a joint lodger, but had described the lodgings as being of the annual value of 10*l.*

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instead of 20*l.*, and the revising barrister, being satisfied from the evidence that their annual value was 20*l.*, and that the claimant's occupation was of the statutory value of 10*l.*, amended both the claim and the declaration in this respect. As to this latter case, however, the learned counsel who appeared in support of the rule, admitted that the rule had been moved under a mistake as to the exact facts, and abandoned it without argument.

J. Alderson Foote shewed cause against the rule. This was a "mistake" which the revising barrister had power to amend under s. 28, sub-s. 2, of the Act of 1878 (1): the declaration being a part of the statutory claim of a lodger he could amend both claim and declaration: *Ainsley* v. *Nicholson*. (2) The question of mistake is one of fact for the revising barrister. The only restriction on the general right of amendment given by sub-s. 2 is that imposed by sub-s. 13, which forbids evidence to be given of a different qualification, or an amendment to be made which would change the nature of the qualification; here the effect of the amendment was not to change the qualification, but to strike out that which was mere surplusage, leaving behind that which had always been a good description of the qualification.

J. V. Austin, for the applicant, in support of the rule. The revising barrister's power of amendment can only be exercised subject to the provisions of sub-s. 13, and the effect of this amendment is to alter the nature of the qualification. The description of a qualification as being the occupation of a house cannot be altered to the occupation of houses in succession:

(1) By the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28, "A revising barrister shall . . . . perform the duties and have the powers following": Sub-s. 2: "He may correct any mistake which is proved to him to have been made in any claim or notice of objection." Sub-s. 13: "Except as herein provided, and whether any person is objected to or not, no evidence shall be given of any other qualification than that which is dsscribed in the list or claim, as the case may be, nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list except for the purpose of more clearly and accurately defining the same."

(2) 24 Q. B. D. 144.

Foskett v. *Kaufman* (1); and the qualifications of sole lodger and joint lodger, which were created by different statutes, are as different as those of occupation of one house and successive occupation of more than one. In the present case the claim is an attempt to introduce a hybrid qualification unknown to the law; or else the claim is an alternative one, which upon one of the alternatives is bad.

POLLOCK, B. I am of opinion that this rule must be discharged. It is clear that the Court ought not to be too astute at picking holes in the decisions of revising barristers in regard to making amendments, when they are acting within their power; though, of course, if the amendment made is one which they are not authorized by statute to make, it cannot pass. It is to be observed with respect to the correction of a mistake under sub-s. 2, that, if the amendment made by the revising barrister is based on a finding of fact, the Court will not interfere; therefore, in the present case, so far as regards the question whether the claims were framed with the view of putting a difficulty on the other side or whether they were so framed by a mere mistake, it has been dealt with by the revising barrister who has found that it was a mistake. It must not be supposed that we do not give effect to sub-s. 13, which prevents the making of an amendment which would alter the nature of the qualification; that means that a man must not claim in respect of one subject-matter and give evidence of another and wholly different subject-matter; he may not, for instance, make a claim in respect of building A, and give in evidence facts relating to building B. That was the vice of the amendment made in *Foskett* v. *Kaufman* (1) where the claim made was in respect of the occupation of a single house, and was amended to one in respect of the occupation of several houses in succession; in such a case it is clear that the amendment ought not to be allowed, because the agent of the other side had no notice of what the real claim was, and would only be able to make inquiries about the house in respect of which the claim was originally made; it might turn out that the result of those inquiries would be that the occupation of that house was

(1) 16 Q. B. D. 279.

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insufficient, and therefore an amendment could not be allowed which would have the effect of misleading the other side. What we are now holding in no way clashes with that very salutary decision.

HAWKINS, J. I am of the same opinion, and have nothing to add.

Rule discharged.

Solicitors for applicant: *Farman & Dumas, for Dunn, Exeter.*

Solicitors for respondent: *Robinson, Preston, & Stow, for Friend & Beal, Exeter.*

W. J. B.

HICKS *v.* STOKES.

1892

Nov. 8.

Parliament—Registration—County Vote—Notice of Objection—Description of Place of Abode of Objector—Registration Order, 1889, *Forms* 5 (*a*) (*b*), *and I., No.* 2.

Notices of objection to certain county voters were signed "J. B., of Burnard's Terrace, on the register of electors for the township of Bodmin Borough." The revising barrister found as a fact that no one had been misled or inconvenienced by reason of the notices omitting to state the name of the town in which the said terrace was situate:—

Held, that the place of abode of the objector was sufficiently described under the Registration Order, 1889, Forms 5 (*a*) (*b*).

CASE stated by the revising barrister for the Bodmin Division of Cornwall.

At a Court held for the revision of the lists of voters for the South-Eastern, or Bodmin Division, of the county of Cornwall, it appeared that notices of objection had been served upon a number of persons resident in different parishes in the said Division, objecting to their names being retained on the ownership list, or on the lodgers or occupiers lists, as the case was. The notices of objection were signed, in the case of the ownership voters, by the respective objectors as follows: "John Badgery (place of abode), Burnard's Terrace, on the register of electors for the township of Bodmin Borough," and "Thomas Brock (place of abode), St. Nicholas Street, on the register of electors for the township of Bodmin Borough;" and the notices

of objection to lodgers and occupiers were signed: "John Badgery (place of abode), Burnard's Terrace, on the list of parliamentary electors (and county electors or burgesses) for the township of Bodmin Borough," and "Thomas Brock (place of abode), St. Nicholas Street, on the list of parliamentary electors (and county electors or burgesses) for the township of Bodmin Borough."

It was contended by the appellant that the notices of objection were invalid on the ground that the addresses of the objectors at "Burnard's Terrace" and "St. Nicholas Street" respectively, were insufficient without the addition of the name of the town in which those streets were situate. The revising barrister was of opinion that the form of the notices shewed that the place of abode of the objectors was in Bodmin, and held as a fact that no one had been misled or inconvenienced by the omission. He further held that if the addresses were insufficient, he had power to amend, and did amend accordingly, by adding in each instance the word "Bodmin." One of the voters objected to appealed on behalf of himself and the others.

Duke, for the appellant. The forms of notice of objection under the Registration Order, 1889, applicable to the present cases—Forms 5 (*a*) (*b*) of the Forms for Ownership Electors, and Form I., No. 2, of the Forms for Parliamentary Occupation Electors and County Electors in a Parish not in a Parliamentary Borough—require that the "place of abode" of the objector should be stated. The statement of the street in which the objector resides is not of itself enough. It is true that in *Sheldon* v. *Flatcher* (1) a notice of objection was held sufficient which was signed "J. F., of 5, Sherborne Street, on the list of voters for the parish of Cheltenham." But there the vote objected to was a vote for the borough of Cheltenham, and the objector must consequently have been resident in that borough; it was unnecessary, therefore, to state that Sherborne Street was in Cheltenham. But here the vote objected to is a county vote, and the objector may reside in any part of England. There is nothing, therefore, to shew the voter that the Burnard's Terrace

(1) 17 L. J. (C.P.) 34.

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or St. Nicholas Street, in the notices of objection, are the streets of that name in the town of Bodmin. In *Woollett* v. *Davis* (1), the notice of objection was signed "James Birch, of 'The Oaks,' on the register of voters for the parish of St. Woollos;" and in *Humphrey* v. *Earle* (2), it was signed "George Chapman, of Churchyard, on the list of parliamentary voters for the parish of Petersfield." In both those cases the votes objected to were county votes, and in both the notice of objection was held insufficient. Secondly, if the notices were insufficient, the revising barrister had no power to amend. No doubt the power of amendment given by 41 & 42 Vict. c. 26, s. 28, sub-s. 2, is very wide, providing, as it does, that a revising barrister "may correct any mistake which is proved to him to have been made in any claim or notice of objection;" but it was not intended to apply to a case in which the exercise of it would defeat the object of the Act. In *Adams* v. *Bostock* (3) no doubt the omission of the objector's place of abode was held to be a mistake which the barrister had power to amend, but there the vote objected to was a borough vote, and that case consequently stands on the same footing as *Sheldon* v. *Flatcher*. (4)

T. J. Bullen, for the respondent, was not called upon.

LORD COLERIDGE, C.J. Two points have been argued for the appellant in this case: first, that the notices were bad, and secondly, that if they were bad the revising barrister had no power to amend. I do not think it necessary to decide the latter point as to amendment, for I am of opinion that the notices were sufficient without it. According to the authority of *Sheldon* v. *Flatcher* (4), and according to good sense, I think that the objectors' places of abode were sufficiently described. The decision in *Sheldon* v. *Flatcher* (4) seems to me to be directly in point. We have been pressed with the case of *Humphrey* v. *Earle* (2), but the distinction between that case and the present is that there there was no finding that the persons objected to had not been misled; and the Court seem to have thought that the omission of the word "the" before "Churchyard" might have

(1) 4 C. B. 115.
(2) 20 Q. B. D. 294.
(3) 8 Q. B. D. 259.
(4) 17 L. J. (C.P.) 34.

misled them into supposing that the address did not refer to the churchyard in Petersfield, whereas here the revising barrister has found, as a fact, that no one has been misled or inconvenienced by the omission.

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HAWKINS and CAVE, JJ., concurred.

Appeal dismissed.

Solicitors for appellant: *Law & Worssam, for Bond, Pearce, & Bickle, Plymouth.*

Solicitors for respondent: *Busk & Co., for Stokes, Bodmin.*

J. F. C.

PEASE *v.* TOWN CLERK OF MIDDLESBROUGH.

1892
Nov. 8.

Parliament—Registration—Objection to Name being on List of Voters—Qualification of Objector—Objector's Name struck off List before Objection heard—6 & 7 *Vict. c.* 18, *s.* 17.

By s. 17 of 6 & 7 Vict. c. 18: "Every person whose name shall have been inserted in any list of voters for any city or borough may object to any other person as not having been entitled on the (15th) day of July next preceding to have his name inserted in any list of voters for the same city or borough, and every person so objecting" shall give notice of objection as therein prescribed:—

Held, that, under this section, an objector is qualified for the purposes of his objection if his name was, at the time of service of notice of his objection, upon any of the lists of voters prepared by the overseers, even though before such objection is heard his name has been struck off such list by the revising barrister.

CASE stated by revising barrister.

At a court held for the revision of lists of voters for the parliamentary and municipal borough of Middlesbrough, one James Walton appeared to object to the name of Arthur Pease (the appellant) being retained on the Occupiers List, Div. I., for the township of Middlesbrough within the said borough. On behalf of the appellant, objection was taken that there was no jurisdiction to hear the objection made by Walton, on the ground that Walton's name was not on the existing register of voters for Middlesbrough, nor at the time when his objection came on to be heard was it on any list of voters for Middlesbrough.

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Walton's name had been inserted by the overseers of Linthorpe (another township in the borough of Middlesbrough) in the Occupiers List, Div. I., for that township, which was duly published by them on August 1, 1892. On August 20, Walton gave notice in due form to the appellant and to the overseers of the township of Middlesbrough of his objection to the appellant's name. On the same date Walton received notice from a duly-qualified objector of an objection to his own name being retained on the above-mentioned list. The hearing of the objections to the names both of the appellant and of Walton came on upon the same day; but the objections to the Linthorpe list were heard first, and Walton's name was struck out. The revising barrister held that Walton was none the less qualified to object to the appellant's name, and, having heard the objection, removed the appellant's name from the list, subject to a case for the Court as to whether he had jurisdiction under the circumstances to entertain the objection made by Walton.

Macaskie, for the appellant. The qualification of the objector must exist at the time when his objection is heard. Sect. 17 of 6 & 7 Vict. c. 18, no doubt, says that any person "whose name shall have been inserted in any list of voters" may object; but the lists prepared by the overseers do not become "lists of voters" within the meaning of that section until they have been passed and signed by the revising barrister. If it were otherwise, hardship might arise from objections being made by unqualified persons whose names had by the wilful misconduct or negligence of the overseers been improperly placed upon the list. Sect. 6 of the same Act provides, with reference to county voters, that, for the purposes of objections, inter alia, the list of claimants, together with the copy of the existing register, "shall be deemed to be the list of voters." But there is no corresponding provision with reference to borough voters.

[*J. Digby*, amicus curiæ, referred to the case of *Barr* v. *Chambers*. (1)]

No counsel appeared for the respondent.

(1) L. R. Ir. 22 C. L. 264.

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LORD COLERIDGE, C.J. The objector was, in fact, on the list of voters at the time of service of notice of objection, and that is enough. The appeal must be dismissed.

HAWKINS and CAVE, JJ., concurred.

Appeal dismissed.

Solicitors for the appellant: *Williamson, Hill & Co., for F. Brewster, Middlesbrough.*

J. F. C.

ROBERTSON *v.* JOHNSON.

1892
Nov. 7, 11.

Fishery Acts—Oysters—Close Time—Oysters taken in Foreign Waters and relaid in English Waters—Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 *Vict. c.* 42), *s.* 4.

By s. 4 of the Fisheries (Oyster, Crab, and Lobster) Act, 1877, which imposes a penalty on persons selling oysters between May 14 and August 4, in any year, it is provided that a person shall not be guilty of an offence under the section if he satisfies the Court that the oysters "were taken within the waters of some foreign State."

The appellant was convicted of having sold oysters on a day within the period specified in the Act. It appeared that these oysters having been originally taken in French waters had been brought in a mature state to this country in February or March, and laid down for the purpose of storage at a depth of some fathoms in part of a creek used only for the reception of similar French oysters, where they did not breed, and from which they were dredged when required for sale during the close period:—

Held, that the oysters were "taken within the waters of a foreign State," so as to be excluded from the operation of the Act, and that the conviction must therefore be quashed.

CASE stated by an alderman of the City of London, sitting as a magistrate.

The appellants were convicted under s. 4 of the Fisheries (Oyster, Crab, and Lobster) Act, 1877 (1), for having sold on

(1) By the Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42), s. 4: "A person shall not sell, expose for sale, consign for sale, or buy for sale (1.) any oysters known at the passing of this Act in the oyster trade as "deep sea oysters," between the fifteenth day of June in any year and the following fourth day of August; or

"(2.) Any description of oysters other than those aforesaid, between the fourteenth day of May in any year and the following fourth day of August.

"Every person who acts in contravention of this section shall be liable to a fine not exceeding 2*l.* for the first offence and 10*l.* for the second or any subsequent offence, and also to forfeit all oysters exposed for sale, consigned

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July 4, 1892, during the period of close time provided by the Act, one hundred oysters.

The case set out the following facts, which were either proved or admitted at the hearing:—

"(*a.*) That on the 4th July, 1892, during the period of close time provided by the Fisheries (Oyster, Crab, and Lobster) Act, 1877, the appellant, Ernest John Eason (who is an assistant to the appellant Robertson), sold at the shop of the said Robertson, at 120, Pudding Lane, in the City of London, 100 oysters for the sum of 7*s.* to one George Alfred Hammond, a fishmeter of the Fishmongers' Company, who had asked for French oysters relaid at Stangate Creek, in the Medway.

"(*b.*) That the said Robertson was one of the proprietors of the business carried on at 120, Pudding Lane, aforesaid, and was responsible for the sale of the said 100 oysters.

"(*c.*) That these oysters were not deep sea oysters, but were French oysters relaid at Stangate Creek, in the River Medway.

"(*d.*) That the said 100 oysters so sold by the said appellants were opened, and that one of them was dead, nine were spawning, fifty-seven had just spawned, and the remaining thirty-three were in fair condition.

"(*e.*) That foreign oysters differ from English oysters; but the French oyster is the most like the English oyster in appearance and size.

"(*f.*) That it is a practice to bring over French oysters in February or March, before the hot weather begins, and relay them in the water on a muddy bottom at some fathoms deep, at Stangate Creek aforesaid.

"(*g.*) That the said 100 oysters so sold were a portion of those brought over from France in February or March, and so deposited at Stangate Creek, and that they were mature oysters.

"(*h.*) That the oysters so brought from France were laid with due care from a boat, and were placed in a particular part of the

for sale, or bought for sale in contravention of this section:

"Provided that a person shall not be guilty of an offence under this section if he satisfies the Court that the oysters alleged to have been sold, exposed for sale, consigned for sale, or bought for sale, were taken within the waters of some foreign State."

beds called 'the Shade;' this part was entirely empty of oysters at the beginning of February last, and in it no oysters but matured French oysters, imported in February or March, were placed. The oysters so placed in 'the Shade' were beaconed off from other parts of the grounds occupied by the appellant Robertson, and they were re-dredged by the appellant Robertson's servants and sent to his London shop at Pudding Lane aforesaid, as and when they were required for sale there.

"(*i.*) That these oysters are brought over in a mature state, and are practically fully grown; and if used at the time they were imported would have been fit for food. It was proved to my satisfaction that the oysters so brought were nurtured at the said beds, and that if they were not placed and nurtured there they would not live.

"(*j.*) That the nurture of these oysters is derived from the water and natural causes, and is not effected artificially.

"(*k.*) That French oysters relaid in the waters at Stangate Creek both grow larger and 'spat' or spawn; but that spat or spawn is unproductive; and that mature oysters cannot be reared from the spat of imported French oysters. At Stangate Creek no cultivation of the spawn of French oysters takes place, and there is no recognised oyster bed or bank."

After stating these facts, the case proceeded:

"I was of opinion that the oysters relaid in beds, as described, were alive when brought into this country, and that while lying in English waters for four months or thereabouts they materially changed in their condition, and could not be treated as the same oysters as if they had been sold within a reasonable period of their being brought from foreign waters and without the opportunity of such change taking place.

"That the said appellants had not satisfied me that the said 100 oysters so sold as aforesaid were within the meaning of the statute 'taken within the waters of some foreign State.'

"I was also of opinion that the oysters having been relaid in English waters had so changed their condition as to render them to a large extent not suitable for human food, as nine were spawning, fifty-seven had spawned, and thirty-three only were in fair condition.

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"Finally, I was of opinion that the statute was passed, not only to provide a close time for English oysters, but to prevent oysters being consumed at a time when they were not in an edible condition, and that the words 'taken within the waters of some foreign State,' meant taken for the purpose of as early consumption as the time of transit and sale would permit, and I therefore convicted the said appellants."

Finlay, Q.C., and *C. W. Mathews*, for the appellants.
Poland, Q.C., and *Travers Humphreys*, for the respondent.

Cur. adv. vult.

1892. Nov. 11. POLLOCK, B. This was an appeal from a conviction by an alderman of the City of London, sitting as a magistrate, who stated a case for the opinion of this Court. The alderman convicted the appellants under an information which charged that they in July, 1892, in the City of London unlawfully sold 100 oysters contrary to the statute.

The statute under which the conviction is sought to be maintained is the Fisheries (Oyster, Crab, and Lobster) Act, 1877. By s. 4 of that Act it is provided that "a person shall not sell, expose for sale, consign for sale, or buy for sale": (1.) deep sea oysters between certain dates; or "(2.) any description of oysters other than those aforesaid between the 14th of May and the 4th of August," and then there is a provision for a fine, and also the proviso, "that a person shall not be guilty of an offence under this section if he satisfies the Court that the oysters alleged to have been sold, &c., were taken within the waters of some foreign State." Those are the important words.

Now the alderman here has found certain facts. In the first place he has found the sale of 100 oysters by the defendant at Pudding Lane in the City of London. He has found that those oysters were not deep sea oysters, but were French oysters relaid in Stangate Creek, in the Medway; that they were opened, and that one of them was dead, nine were spawning, fifty-seven had just spawned, and the remaining thirty-three were in a fair condition; that foreign oysters differ from English oysters, but that the French oyster is most like the English oyster; that it

is a practice to bring over French oysters in February and March, and relay them in the water on a muddy bottom some fathoms deep at Stangate Creek; that these oysters were a portion of those brought over from France in February or March, and so deposited at Stangate Creek; and that they were then mature oysters and alive, and that if they had been used at the time they were imported they would have been fit for food. He further found that the oysters so brought were nurtured in Stangate Creek, and that if they were not nurtured they would not live, and that the nurture of those oysters was derived from the water in the natural course and was not effected artificially; and he further found that, while lying in English waters for four months or thereabouts, the oysters had materially changed in their condition, and were to a large extent not suitable for human food.

With regard to that part of the finding I cannot help thinking that it has a material effect upon the case, because if the alderman found that it was within the compass of the Act to aid an illegality by reason of these oysters being unfit for human food, I need not say that his mind would be very much influenced by that consideration. It is clear to me that the Act which we are now considering, and under which the alderman had to decide, has no reference whatever to the question of the fitness of the oysters for human food. That fitness or unfitness is dealt with by other Acts of Parliament, which were passed with the express purpose of preventing the sale of food unfit for human use, and in no sense is dealt with by this Act of Parliament. I cannot help thinking that this finding of the alderman probably led him to a great extent to come to the conclusion to which he has come.

A further point upon this case to which I ought to allude is this, that besides referring to the Act of Parliament, by the case a power is given to this Court to refer to the report of the committee of the House which sat before the Act was passed, and upon which the Act was based. I need not say that this reference to the report in no sense enables us to control the meaning of the words in the Act of Parliament by anything that passed either in the report or in the evidence given under the report;

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but it was very proper that the report should be referred to, because it contains the history of the previous usage of persons interested in the sale and purchase of oysters in this country as regards the importation of foreign oysters. It is plain that long before 1877, and ever since 1877 down to the present time, there has been a bonâ fide course of dealing to a considerable extent both in American oysters and in French oysters, which are taken in foreign waters and brought to this country and relaid in the manner in which these oysters were relaid, and then, when a convenient season arrives, they are sold to the public for consumption. That has a material bearing on this case, because it is not contended that anything was done here in a peculiar or surreptitious manner. The appellant acted according to a well-known course of dealing.

The only question that remains, therefore, is, whether that dealing, however open and well known, was a contravention of the statute.

No question arose before the magistrate or before us as to whether these, being foreign oysters, came within the words of this, an English Act of Parliament. A somewhat similar case was dealt with in *Guyer* v. *Reg.* (1), which was referred to by the alderman. In that case the subject-matter dealt with was dead partridges sold in this country. It was admitted they were not English partridges—it was admitted they were foreign birds, and that they had never been alive in this country. It was held there that the Act had no application to any such birds at all. The law takes no cognizance of birds killed abroad and brought to this country, with reference to our game laws, or to any of the provisions made for the sale of game in this country. The present case differs on this point, because it seems to me clear that these oysters, although taken abroad, are within the Act, being sold in England while alive.

Then comes the crucial question in this case: Were these oysters taken within the waters of some foreign State, or would it be more correct in point of fact to hold in law that these oysters were "taken" when they were taken out of the bed at Stangate Creek, where they had been relaid when they were

(1) 23 Q. B. D. 100.

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brought from foreign parts? It seems to me that the bed where the oysters are deposited is not a fishery in the sense contemplated by the Act of Parliament, although it might become a fishery if the oyster spat had bred there, or possibly, if very small oysters, that could be nurtured so as to become large oysters by nurturing and artificial feeding, were brought from a foreign country, it might then be said that they had become English oysters. In the present case it seems to me that the only two points on which the prosecution can rely in support of their contention are the size of the oyster bed in which these oysters were laid, and the time during which they remained there.

Nobody would argue, I suppose, that if the oysters were brought over and put into a tub for three or four days while they were waiting sale, the taking them from that tub would make that tub a fishery. It seems to me that this is a mere question of degree. These oysters were brought to England in pursuance of a well-known trade and course of dealing, and were deposited in Stangate Creek for the convenience of those who were going to sell them. The depositing and retaking was not, I think, the taking that was contemplated by the Act, but was merely a taking, from a convenient storing-place, oysters, that had been taken within the waters of some foreign State.

On these grounds it seems to me that this conviction cannot stand, and must be quashed.

HAWKINS, J. I am of the same opinion. It is obvious that the intention of the Legislature in passing 40 & 41 Vict. c. 42, was the institution of a close time for English oysters.

Now in the Act itself there are very few lines which I need notice. It is termed an Act to amend the law relating to the fishery of oysters. Well, no one can read that and reflect on the object of it without seeing that it was intended to be an Act which had relation to the fishery of oysters in British waters, because our Legislature could have no right to exercise any authority over any other country. In order to enforce the object with which the Act was passed, the 4th section enacts that a person shall not sell any description of oysters other than deep sea

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oysters, between May 14 in any year and the following August 4. A penalty is enacted for contravention of the section, and the section proceeds: "Provided that a person shall not be guilty of an offence under this section if he satisfies the Court that the oysters alleged to have been sold, exposed for sale, consigned for sale, or bought for sale, were taken within the waters of some foreign State."

The sole question here is whether the oysters in question were oysters which, within the meaning of the Act, were taken within the waters of a foreign State, or whether upon the facts before us we ought to hold that they were taken within the waters of some English fishery.

The oysters were sold as French oysters, and they were brought over from France in the early part of the year—that is, in the month of February or in the month of March—and it is stated in the case that it is the practice to bring over French oysters in February or March before the hot weather begins, and to relay them in the water on a muddy bottom some fathoms deep at Stangate Creek. The oysters were laid with due care from a boat, and were placed in a particular part of the beds called 'the Shade.' This part was entirely empty of oysters at the beginning of February last, and in it no oysters but matured French oysters (which these were), imported in February or March, were placed. The oysters so placed in 'the Shade' were beaconed off from other parts of the grounds occupied by the appellant Robertson, from which they were re-dredged by the appellant Robertson's servants and sent to his London shop at Pudding Lane as and when they were required for sale there. The oysters were brought over in a mature state, and were practically fully grown, and if used at the time they were imported would have been fit for food. It was proved that the oysters so brought were nurtured at the beds, and that if they were not placed and nurtured there they would not live. It was also proved that oysters cannot be imported in the summer-time direct from the foreign State, or they would die. This being the state of things, the question is, whether this can be said to be a taking, within the meaning of the Act, from English or from foreign waters.

After a good deal of consideration I have come to the con-

clusion that these are not to be treated as English oysters, or as taken from an English fishery; but that they are French oysters to all intents and purposes.

It is obvious that the Legislature, if they intended to allow the traffic in oysters at all, must have intended that they should be brought over to this country alive; and if they are to be brought over alive, I can see no ground for supposing that the Legislature intended that the oysters should be consumed immediately on their arrival. A man would not, of course, have his oysters sent over in small quantities merely for each day's consumption. It might be possible to do it; but at any rate I am satisfied, from reading the Act of Parliament, that there is nothing to prevent a man from receiving oysters taken in foreign waters by thousands if he thinks fit so to do. If they are to be brought over for the purpose of merchandise, why are they not to be stored somewhere? If stored in a tank, or in any confined building where the proper water could be provided for them, no one could contend that the mere taking them from such water would be taking them from an English fishery. Here the appellants have a place which seems to be devoted to the reception of these French oysters, which are kept separate altogether from English oysters. They are deposited in a particular place in Stangate Creek. The place where they are deposited is marked off in the ordinary way by buoys or beacons; and there they remain until they are wanted for use. They do not breed in this country. They cannot breed here, as is found by the case. And, looking at the whole question, I have come to the conclusion myself that, although, no doubt, this Stangate Creek, where these oysters were deposited, and from whence they were taken, covers a considerable area of land, yet that there is no reason why a store for oysters should not be extended over a considerable area of land, just as if a man wanted to keep rabbits, where they might be taken at any hour of the day, he might store them in a large field or inclosure which might cover acres of ground. The question, to my mind, is rather more one of fact than of law—whether these oysters were placed in this place for the purpose of storage? If that were the bonâ fide object of depositing the

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oysters there, and if they never assumed any other character than French oysters—that is, by being mixed with English oysters, or breeding on English soil—I cannot see how the penalty can attach for putting them in that creek and taking them from it when once they were lawfully in this country. I quite agree that if these oysters had been brought over when they were very small for the mere purpose of being laid down on an English oyster-bed in order that they might mingle with English oysters, and grow up there, so that when they were dredged it would be impossible to say whether they were French oysters or English oysters, I should myself have come to the conclusion that would bring oysters originally taken in France within the very mischief which this Act was intended to provide against, and that they would be oysters in an English fishery for which a close time ought to be observed. But if the appellants did use this creek, and intended to use it only as a store for the purpose of keeping alive and in good condition the oysters which they had a lawful right to buy, and store somewhere—if that be all—I cannot myself conceive that the Legislature intended to make their acts an offence punishable by English law.

That being so, I agree with my brother Pollock that this conviction ought to be quashed.

There is one thing I would observe. Some comments have been made in the course of the case about the oysters being unfit for food and some of them having spawned. I have passed all that over because I think that that is absolutely immaterial. The sole question here is, whether or not—it being agreed and admitted that when the oysters arrived in this country they were properly and lawfully the objects of merchandise—the appellants had a right to store them if they thought fit to do so. I cannot think that storing them in the way they did was ever meant to be an offence by the Act.

Conviction quashed.

Solicitors for appellants: *Powell & Burt.*

Solicitors for respondent: *C. O. Humphreys & Sons.*

A. P. P. K.

PAXTON *v.* BAIRD. 1892 *Nov.* 24.

Practice—Writ specially Indorsed—Application for Judgment—Amendment of Indorsement after Appearance and before Summons taken out—Order III., *r.* 6; *Order* XIV., *r.* 1.

The defendant appeared to a writ which contained a claim for interest (not alleged to be due by statute or under any contract), and which was therefore not a writ specially indorsed under Order III., r. 6. The plaintiff obtained an order to amend the writ by striking out the claim for interest, and having amended it accordingly, he took out a summons for judgment under Order XIV., r. 1:—

Held, that the writ having, by the amendment, become a good specially indorsed writ under Order III., r. 6, the appearance was an appearance to a specially indorsed writ, and Order XIV., r. 1, applied.

APPEAL from chambers.

The writ was issued on September 24, 1892, and was indorsed as follows:—"Statement of claim: The plaintiff's claim is 675*l.* 14*s.* 1*d.*, balance for money lent, and interest." The particulars were then set out: "The plaintiff also claims interest at the rate of 6 per cent. per annum on 595*l.* 15*s.*, part of the above amount, from the date of the writ until payment or judgment."

The defendant entered an appearance in due course.

On October 21 the plaintiff took out a summons for judgment under Order XIV., r. 1; but the master held that the writ was not a specially indorsed writ under Order III., r. 6, there being a claim for interest, and no contract shewn. He, therefore, gave the defendant unconditional leave to defend.

The plaintiff then took out a summons for leave to amend the writ; and on November 1 the master made an order (to which the defendant was a party), "that the plaintiff be at liberty to amend the writ of summons in this action, and the copy thereof filed at the central office, by striking out the claim for interest in the indorsement of claim on the said writ, and substituting 595*l.* 15*s.* for the figures 675*l.* 14*s.* 1*d.*; and that the appearance entered herein by the defendant do stand as an appearance to the said writ as amended." The plaintiff then took out a fresh summons for judgment under Order XIV., r. 1, and on November 12 the master made an order giving him leave to sign final judgment

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in the action. This order was upheld by Charles, J., at chambers, and the defendant appealed.

F. M. Abrahams, for the defendant. Order XIV., r. 1, does not apply. The original writ, to which the defendant appeared, was not a specially indorsed writ under Order III., r. 6: *Elliott* v. *Roberts*. (1) There is no power to amend it, so as to make it a specially indorsed writ: *Gurney* v. *Small*. (2)

T. Willes Chitty, for the plaintiff. The point was expressly left open in *Gurney* v. *Small* (2), which only decided that the writ must be a good specially indorsed writ under Order III., r. 6, at the time when the summons for judgment under Order XIV. is taken out. Here a fresh summons was taken out after the indorsement had been amended.

Abrahams, replied.

LORD COLERIDGE, C.J. The point raised by this case is an extremely technical one; but it has never yet come before a Court for absolute decision. It was noticed in the case of *Gurney* v. *Small* (2), and Wills, J., in deciding that case, indicated the view which he took of the point, and Charles, J., concurred in his judgment.

Although the point is a technical one, it is right that it should be raised. Order XIV. is, undoubtedly, an order which requires to be watched, and we must see that proceedings taken under it are regular. The law is, that, in order that Order XIV., r. 1, should apply, the writ must be a specially indorsed writ under Order III., r. 6, and there must be an appearance to that writ. In this case the writ as first issued was admittedly not a specially indorsed writ under Order III., r. 6. An appearance was entered by the defendant; and, on a summons for judgment under Order XIV., r. 1, the defendant obtained unconditional leave to defend. Then the plaintiff, by the leave of the master, amended his writ, and by that amendment turned it into a specially indorsed writ under Order III., r. 6. It is contended that, even if that amendment makes the writ a specially indorsed writ, there has been no appearance to the writ as amended.

(1) 36 Sol. J. 92.

(2) [1891] 2 Q. B. 584.

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I have, however, come to the conclusion that the appearance to the original writ is sufficient. It is not necessary that there should be a fresh appearance where a writ is amended. The technicality is, therefore, satisfied by that appearance. There is a specially indorsed writ under Order III., r. 6, to which the defendant has appeared. Order XIV., r. 1, therefore, applies; and this appeal must be dismissed.

WILLS, J. I am glad to be able to come to the same conclusion, as otherwise it is evident that there would be costs thrown away where the writ was originally not specially indorsed under Order III., r. 6.

I adhere to the view I expressed in *Gurney* v. *Small*. (1) In that case the substantial decision is that Order XIV., r. 1, cannot apply unless when a person takes out a summons for judgment under it he has his tackle, so to speak, in order. There seems to me no reason, either in policy, justice, or good sense, for saying that where before the summons is taken out the writ has been amended so as to make it a specially indorsed writ, and the defendant has appeared, Order XIV., r. 1, will not apply. The writ by amendment has become a specially indorsed writ, and the appearance is still standing, and is, therefore, an appearance to the amended writ. There is, therefore, an appearance to a specially indorsed writ, which is what Order XIV., r. 1, requires. Charles, J., who was a party to the decision in *Gurney* v. *Small* (1), appears to me to have come to a right decision, and this appeal must be dismissed.

That part of the master's order, which directed the appearance already entered to stand as an appearance to the amended writ, seems to me unnecessary and inoperative, as the appearance when once entered stands, and there is no need for a fresh appearance to a writ when it has been amended.

Appeal dismissed.

Solicitor for plaintiff: *Vincent A. Applin.*
Solicitors for defendant: *Blair & W. B. Girling.*

(1) [1891] 2 Q. B. 584.

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Nov. 10;
Dec. 3.

[IN THE COURT OF APPEAL.]

HARRISON *v.* DUKE OF RUTLAND AND OTHERS.

Highway—Trespass to Land—Use of Highway otherwise than as such—Practice—Declaratory Judgment.

The defendant was the owner of a grouse moor crossed by a highway, the soil of which was vested in him. On the occasion of a grouse drive upon this moor, the plaintiff went upon the highway, not for the purpose of using it as a highway, but solely for the purpose of using it to interfere with the defendant's enjoyment of his right of shooting, by preventing the grouse from flying towards the butts occupied by the shooters. The defendant's keepers having forcibly prevented the plaintiff from such interference, he brought an action for assault against the defendant, in which the defendant justified on the ground that the plaintiff was a trespasser upon his land on the occasion in question, and by way of counter-claim asked for a declaration to that effect:—

Held, that, inasmuch as the plaintiff was upon the highway for purposes other than its use as a highway, he was a trespasser; and, by Lopes, L.J., and Kay, L.J., Lord Esher, M.R., dissenting, that the Court ought to make a declaration to that effect.

MOTION by the plaintiff in an action for assault for a new trial or to enter judgment for plaintiff on the claim. Cross-motion by the defendants for a new trial or for judgment on certain issues on the claim and on the counter-claim.

The pleadings, the event of the trial, and the facts, fully appear from the judgments, and are stated in detail in the judgment of Lopes, L.J.

The plaintiff in person.

Sir H. James, Q.C., and *R. M. Bray*, for the defendants. (1)

Cur. adv. vult.

Dec. 3. The following judgments were delivered:—

LORD ESHER, M.R. In this case the plaintiff brought his action against the Duke of Rutland and the other defendants, who acted by the Duke's authority, for assault and false imprisonment. The defendants justified, and, alternatively, brought into

(1) It has been thought unnecessary to report the arguments, because the arguments for the defendants, who succeeded, sufficiently appear from the judgments in their favour, and, the plaintiff appearing in person, there was substantially no argument of the points of law on his side.

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Court the amount of 5*s.*, as being sufficient to satisfy the plaintiff's claim; and there was also a counter-claim by the Duke of Rutland.

The case came before the Lord Chief Justice for trial, when the jury gave a verdict for the defendants on the claim; and on the counter-claim the Lord Chief Justice directed a verdict for the plaintiff. The plaintiff appealed to this Court on the ground that the verdict for the defendants on the claim was wrong; the defendants also brought a cross-appeal against the Lord Chief Justice's ruling.

The main facts of the case are really not in dispute. The Duke of Rutland, with his friends, had a right to shoot on certain moors, and was on the occasion in question exercising that right. The plaintiff, from some perverted notion of desiring to interfere with the shooting, went on to a highway which crosses these moors, knowing that it was close to the place where the Duke and his friends were exercising their undoubted right. The land on both sides of this highway belonged to the Duke, and therefore the soil of the highway was vested in him. The plaintiff went on to this highway, not for the purpose of going to or coming from any place, not for the purpose of using the highway as a highway at all, but merely for the purpose of using the highway itself in order to incommode the Duke and his friends and prevent the exercise of their right. He went on to the highway near the butts, towards which grouse were to be driven by the Duke's keepers, solely for the purpose of preventing the grouse from coming in the direction of the butts, and so interfering with the Duke's exercise of his right. He did so interfere by obvious means, such as waving his pocket-handkerchief and opening and shutting his umbrella, for the mere purpose of keeping the grouse away. He was asked to desist, but he refused to do so. Thereupon the Duke's servants forcibly laid hold of him and held him down on the ground for the purpose of preventing him from interfering with the exercise of the Duke's right, until the drive was over and he could no longer interfere. They held him down only so long as was necessary for that purpose. That they did not do so with any unnecessary degree of violence seems to me to be clearly made out by the evidence. The

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defendants, as I have said, in case there was some excess, brought 5*s.* into Court, and they also pleaded a justification on the ground that the plaintiff was trespassing upon the Duke's land for the purpose of interfering with the Duke's enjoyment of his rights over his land, and that they used no more force than was necessary to prevent the plaintiff from doing so. There was therefore the issue on this plea of justification, and the other issue would be whether, assuming that the defendants had exceeded their rights in what they did to the plaintiff, the amount of 5*s.* was sufficient by way of damages. The jury found a verdict for the defendants on the claim. That was a general verdict, and it may have been that the jury thought that, if there was an excess of force used, the amount paid into Court was sufficient. The Lord Chief Justice, in his anxiety to maintain the rights of the public over highways to their fullest legal extent—an anxiety with which I fully sympathise—appears to me not to have taken into consideration certain matters in the case which should have been considered, and he directed the jury that, as a matter of law, the plaintiff was not trespassing on the highway, and therefore was not trespassing on the land of the Duke. Notwithstanding that direction, the verdict for the defendants on the claim is right, because, whichever way the case is looked at, the amount paid into Court may be sufficient, and it appears to me that it is. But the direction to the jury prevented the entry of a verdict for the defendants on the issue of justification, and the verdict has been entered on that issue for the plaintiff; and it prevented the entry of a verdict for the defendant, the Duke of Rutland, on the counter-claim, upon which accordingly the verdict has been entered for the plaintiff. The plaintiff appealed against the verdict for the defendants on the claim on the ground that it was against the evidence. I am clearly of opinion that that appeal cannot be entertained, because I think that, whichever way the case is looked at, the verdict of the jury on the claim was right. On the cross-appeal, the defendants' counsel asked the Court to enter the verdict for the defendants on the issue on their plea of justification, and to enter a verdict and judgment for the Duke of Rutland on the counter-claim. As to the result in respect of a portion of what is asked for on the cross-

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appeal, I have no doubt. I think that the verdict should be entered for the defendants as regards the issue on the defendants' justification. And on the counter-claim, if it be asked for, I think there should be a verdict for the Duke for at the least nominal damages. I know that a claim to further relief was made in the counter-claim; but I will deal with that hereafter. The great difficulty to my mind in this case is to express the reasons for our judgment so carefully that we may not, in upholding the legal right of the owner of the land, interfere with the largest possible rights of the public to the enjoyment of the highway as such. The servants of the Duke in this case were no doubt taking a very strong course. The plaintiff was undoubtedly on a highway; he was not merely told to move on, but he was actually controlled and imprisoned for a time. That is a very strong measure, which ought to be employed with great care, and which puts the person who employs it in considerable jeopardy in a civil action. The plea of justification is founded on the allegation that the plaintiff was trespassing on the soil of the highway. The question is whether that is so. What is the true rule of law as to the user of a highway? It has been laid down in *Reg.* v. *Pratt.* (1) The Lord Chief Justice at Nisi Prius, where a judge cannot examine cases so closely as we can here, seems to have thought that the decision in that case depended in some way on its being a criminal case; but I think, if the judgments are examined, it will appear that the decision of that criminal case depended on whether the appellant was or was not a trespasser, and required the judges to say whether he had or had not committed a trespass. In that case the land in question was a highway, and the prosecutor was the owner of the soil. The appellant was charged with the offence of trespassing on land in pursuit of game. The foundation of that charge was a trespass. The appellant there, like the plaintiff in this case, did not go on to the highway for the purpose of using it as a highway at all; but he went on to it only for the purpose of searching for game. That is so stated by Lord Campbell, C.J. He said: "I think that the magistrates were perfectly justified in concluding that

(1) 4 E. & B. 860.

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Pratt was trespassing on land in the occupation of Mr. Bowyer in search of game. He was beyond all controversy on land, the soil and freehold of which was in the owner of the adjoining land—that is, Mr. Bowyer. It is true the public had a right of way there; but, subject to that right, the soil and every right incident to the ownership of the soil was in Mr. Bowyer. The road, therefore, must be considered as Mr. Bowyer's land. Then Pratt, being on that land, was undoubtedly a trespasser, if he went there, not in the exercise of the right of way, but for the purpose of seeking game, and that only. If he did go there for that purpose only, he committed the offence named in the Act." So, if a man goes on to part of a highway, the soil of which belongs to the owner of the adjoining land, not for the purpose of using such part of the highway as a highway, but only for some other purpose, "lawful or unlawful"—to use the words of Crompton, J., in the same case—he is in so doing committing a trespass against the owner of the soil. That case is founded on other cases which had gone before, and there are subsequent cases in which it has been followed. Therefore, on the ground that the plaintiff was on the highway, the soil of which belonged to the Duke of Rutland, not for the purpose of using it in order to pass and repass, or for any reasonable or usual mode of using the highway as a highway, I think he was a trespasser. But I must observe that I think that, if the language of Erle, J., and of Crompton, J., in *Reg.* v. *Pratt* (1), were construed too largely, the effect might be to interfere with the universal usage as regards highways in this country in a way which would be mischievous, and would derogate from the reasonable exercise of the rights of the public. Construed too strictly, it might imply that the public could do absolutely nothing but pass or repass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that is so. Highways are, no doubt, dedicated primâ facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of

(1) 4 E. & B. 860.

using it, I do not think that he will be a trespasser. Again, I do not think that such a trespass can be made out, except where acts other than the reasonable and ordinary user of a highway as such have been done on that particular portion of the highway, the soil of which belongs to the owner alleging a trespass to his land. If a person is passing along a part of a highway which belongs to a particular owner, in order to do something beyond, on land which does not belong to that owner, then, so far as that owner is concerned, he is merely passing along that part of the highway, and, whatever it may be his intention to do further on, there would be no trespass as against such owner. Again, if a man is passing along a highway, only intending, so far as the highway is concerned, to pass along it, though he intends to go from it and goes into other land of the same owner, and does something contrary to his rights, I do not think that there will be any trespass on the highway. But the plaintiff in this case, it should be observed, was doing that which comes within what Lord Campbell, C.J., said in *Reg.* v. *Pratt* (1)—he was using this part of the highway solely for the purpose of interfering with the rights which the owner of the land was exercising on another part of his land. He did not intend to go on the land of the Duke by the side of the highway, and thence interfere with the Duke's sport. He knew that would be a trespass. He stood on the highway, and walked up and down on it for the purpose of doing things which interfered with the Duke's enjoyment of his land near the highway. He was, therefore, not there for the purpose of using the highway as such in any of the ordinary and usual modes in which people use a highway. Under those circumstances, I think that he was a trespasser. Cases might arise in which it would be a question whether what a person was doing was a reasonable and usual use of a highway. In such cases there might be a question for a jury as to whether such person was using the highway as a highway for passing, in accordance with the reasonable and ordinary user of it for that purpose. In this case, on the undisputed facts, it appears to me clear that the plaintiff was a trespasser, and, therefore, on the cross-appeal, I think that the defendants are entitled

(1) 4 E. & B. 860.

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to a verdict on the issue of justification. With regard to the counter-claim, I have the misfortune to differ to some extent from my learned brothers. What was originally asked for on the counter-claim was not damages only, but an injunction; but the counsel for the defendants, in argument before us, asked not for an injunction, but a declaration. I have, and always have had, a disinclination to have imported into ordinary common law actions the procedure of the Court of Chancery, which I have no doubt is excellent for the purposes for which it was usually employed in that Court. I think it is a misfortune that such procedure should be introduced into common law actions unless in exceptional cases. What is the nature of the case before us? It is a case of an ordinary trespass by a man of obstinate and ill-regulated mind for which no one could suggest that any considerable damages ought to be given. If the trespass were repeated, a fresh action might be brought, in which, no doubt, a jury would give larger damages. What would be the consequence of granting an injunction? If the plaintiff repeated the trespass, he might be sent to prison for an indefinite time. It does not seem to me necessary to bring into an ordinary common law action such as this, this very severe procedure of the Court of Chancery. But the defendants' counsel do not venture to press for an injunction, and say that they will be satisfied with a declaration. I really do not see what the use of such a declaration in a case like this will be. Such a declaration ought, if the defendants' contention is correct, to have been made by the judge at Nisi Prius. That is to say, after he has directed the jury as matter of law, that the plaintiff's conduct on the particular occasion amounted to a trespass—a direction which might afterwards be vouched against the plaintiff—he is to go on to make a declaration which is in effect that the direction he has just given to the jury was right in law. A declaration of this sort may be very usual and valuable in Courts of Equity for some purposes, as where the direction of the judge on a matter of law has to be carried out by others; but I think it is misplaced and unnecessary in a case of this kind. It is now becoming the practice in every ordinary common law action of this kind for the pleader, as a matter of course, to ask for an injunction or a

declaration, thus increasing expense and overloading the case with unnecessary complications. The intention of the Judicature Acts, no doubt, was that, where the principles of law and of equity differed, the principles of equity should prevail; but I do not think the intention was that the procedure of the Court of Chancery should be exercised in ordinary common law actions. I think that the Duke of Rutland ought to have judgment on the counter-claim for nominal damages, but not for a declaration, which, to my mind, would in this case be futile, and have no effect. The result is that the plaintiff's appeal fails, and the defendants' appeal must be allowed.

LOPES, L.J. This, to my mind, is a case of great importance, which must be my excuse for delivering a somewhat lengthy judgment.

This is an action of trespass to the person brought by the plaintiff against the defendants, claiming damages and an injunction. The defendants, amongst other defences, justified the alleged trespass on the ground that the plaintiff was trespassing upon the soil of the defendant, the Duke of Rutland, for the purpose of interfering with the legal right of shooting belonging to the said Duke, which by his friends and keepers duly authorized in that behalf he was then exercising, and alleging the use of no greater force than was necessary for the purpose of abating such trespass. The defendant, the Duke of Rutland, also counter-claimed against the plaintiff in respect of a trespass by the plaintiff to the soil of the said Duke, and for his interference with the exercise by the said Duke of his legal right of sporting over his said lands, alleging threats to continue and repeat such unlawful interference, and claiming an injunction and damages. Alternatively, the defendants brought into Court the sum of 5*s.* in satisfaction of all the causes of action of the plaintiff. The plaintiff joined issue on the defendants' defence and denied the allegations in the counter-claim.

The case came on to be tried before the Lord Chief Justice. So far as material, the facts may be stated as follows: At the times in question the Duke of Rutland was lawfully exercising sporting rights over certain moors belonging to him. These

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moors were in certain parts intersected by certain highways. The soil of such highways, subject only to the easement of passing and repassing which belonged to the public, was vested in the said Duke, he being the owner of the lands on each side adjoining the said highways. Butts were erected, at some places near the said highways, at other places at a distance of 200 yards from the highways, for the purpose of the sportsmen concealing themselves from the grouse which were to be driven towards them. The vision of the grouse is signally acute, and very little will induce them to shy away from the butts and follow a course which would be out of reach of the guns of the sportsmen occupying the butts. The plaintiff, knowing this and believing that he had cause of annoyance with the Duke or with his predecessor in title, placed himself, avowedly and admittedly, on the highway in such a position and so acted as to prevent the grouse from approaching the butts. The plaintiff had done this on former occasions, and had threatened to continue so to act whenever the Duke drove his moors. Some years before the moors had been let to a tenant. During that time the plaintiff, who had been paid by the tenant, had desisted from any interference with the shooting on the moors; but, so soon as the Duke resumed the shooting on his moors, so soon did the plaintiff renew his interference with the sport. It was an undisputed fact in the case that the plaintiff did not use the soil of the highway as one of the public for passing and repassing, or for the legitimate purpose of travel, but was at the times in question using it for the purpose of interfering with and obstructing the legal right of the Duke to exercise sporting rights over his said moors. There was a conflict of evidence as to the amount of force used by the defendants in their attempts to prevent the plaintiff interfering with the sport. In these circumstances the Lord Chief Justice directed the jury that the plaintiff was not a trespasser, and that therefore what the defendants did could not be justified; that the defendants had no cause of action on their counter-claim; and that the only question which they would have to consider was whether 5*s.* was enough to compensate the plaintiff for the acts of the defendants. The Lord Chief Justice said: "I do not think the plaintiff was a trespasser. I do not

think, therefore, that what was done to him was lawful": and again: "The trespass is hardly denied, and is attempted to be justified on grounds that, in my judgment, fail. The trespass, therefore, remains a trespass, not a lawful act. It is an unlawful act. Five shillings has been paid in respect of that unlawful act. In your judgment, is 5*s.* enough? If 5*s.* is enough, verdict for the defendants. If 5*s.* is not enough, then verdict for the plaintiff, with such an addition to the 5*s.* as you think on the whole necessary." The jury thereupon found a verdict for the defendants on the claim, thinking 5*s.* enough, and the Lord Chief Justice ordered judgment to be entered for the defendants on the claim, and for the plaintiff on the counter-claim and pleas justifying the trespass. The result is that, while the defendants succeed on the issue raised as to the 5*s.* paid into Court, the plaintiff has had entered for him the issues raised by the pleas of justification, and has judgment on the counter-claim. This arises from the holding of the Lord Chief Justice that the plaintiff was not, under the circumstances, a trespasser. The plaintiff and defendants have both appealed to the Court, the plaintiff seeking judgment for him on the claim so far as the issue with regard to 5*s.* being enough to satisfy the claim is concerned, alleging the 5*s.* to be contemptuous and inadequate; and the defendants seeking to have judgment entered for them on the pleas justifying the trespass and on the counter-claim.

With great deference I am of opinion that the Lord Chief Justice was wrong in directing the jury that on the facts as admitted the plaintiff was not a trespasser. In my opinion, the Lord Chief Justice ought to have told the jury that the plaintiff, on the admitted facts, was a trespasser, and that the pleas justifying the trespass and the counter-claim must be found for the defendants, and that the only question they had to consider was whether there had been an excess of force used in abating the trespass, and, if so, whether 5*s.* was enough to compensate the plaintiff for such excess. The Lord Chief Justice ought further to have told the jury that if there was no excess then they must find everything for the defendants; but if there was an excess, then if 5*s.* was enough, they ought still to find everything for the defendants; but if, on the other hand, they thought

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5*s.* was not enough, then they should find for the plaintiff for such sum as in their opinion he was entitled to beyond the 5*s.* The jury were of opinion that 5*s.* was enough to cover everything to which the plaintiff was entitled. Their finding on that issue is therefore conclusive, and the verdict and judgment in that respect must stand. But ought the Lord Chief Justice to have told the jury that the plaintiff was not a trespasser?

The interest of the public in a highway consists solely in the right of passage; the soil and freehold over which that right of way is exercised is vested in the owner or owners of the adjoining land, who may maintain actions of trespass against persons infringing his or their rights therein; as, for instance, by permitting cattle to depasture thereon. In *Dovaston* v. *Payne* (1), Buller, J., says: "Whether the plaintiff was a trespasser or not depends on the fact whether he was passing and repassing and using the road as a highway, or whether his cattle were in the road as trespassers." Again, Heath, J., says: "If it be a way, he must shew that he was lawfully using the way; for the property is in the owner of the soil, subject to an easement for the benefit of the public." In the case of *Reg.* v. *Pratt* (2), Pratt had been convicted by justices under 1 & 2 Wm. 4, c. 32, s. 30, of committing a trespass by being in the daytime on land in the occupation of one Bowyer, in search of game. On appeal, a case was reserved by the sessions for the opinion of the Court, and the facts appeared to be that Pratt was in the daytime on a public road (the soil of which as well as the land on both sides belonged to Bowyer) carrying a gun and accompanied by a dog, that Pratt sent the dog into a cover by the roadside which was in the actual occupation of Bowyer, and that a pheasant flew across the road from the cover and was fired at by Pratt, who was still standing upon the road. Upon these facts the Court held that the conviction was right, the road being land in the occupation of Bowyer, subject only to the right of way of the public; and the evidence shewed that Pratt was not on the road in the exercise of the right of way, but for another purpose, namely, the search for game, and that thus he was a trespasser. "On these facts," said Lord Campbell, C.J., "I think that the magistrates were

(1) 2 H. Bl. 527.

(2) 4 E. & B. 860.

perfectly justified in concluding that Pratt was trespassing on land in the occupation of Mr. Bowyer in search of game. He was, beyond all controversy, on land the soil and freehold of which was in the owner of the adjoining land, that is, Mr. Bowyer. It is true the public had a right of way there; but subject to that right the soil and every right incident to the ownership of the soil was in Mr. Bowyer. The road, therefore, must be considered as Mr. Bowyer's land. Then Pratt, being on that land, was undoubtedly a trespasser if he went there, not in exercise of the right of way, but for the purpose of seeking game and that only. If he did go there for that purpose only, he committed the offence named in the Act: he trespassed by being on the land in pursuit of game. The evidence of his being there for that purpose is ample. He waved his hand to the dog; the dog entered the cover and drove out a pheasant, and Pratt fired at it. The magistrates were fully justified in drawing the conclusion that he went there, not as a passenger on the road, but in search of game." Erle, J., in the same case, says: "There can be no doubt, in fact, that Pratt was on land, and that he was in search of game; but it is said he could not be a trespasser because it was a highway. But I take it to be clear law that, if in fact a man be on land where the public have a right to pass and repass, not for the purpose of passing and repassing, but for other and different purposes, he is in law a trespasser, like the cattle in *Dovaston* v. *Payne*." (1) Crompton, J., in the same case, says: "I take it to be clear law that if a man use the land, over which there is a right of way, for any purpose lawful or unlawful other than that of passing and repassing, he is a trespasser." I do not think the language used by the learned judges in that case too large or that it in any way imperils the legitimate use of highways by the public. The Lord Chief Justice, however, appears to have thought that this decision was founded on the fact that Pratt was committing an offence on the highway. The Lord Chief Justice says—I quote his own words: "As he was using the highway not to pass and repass but to be guilty of a criminal offence, the judges held that, he being on the highway for the purpose of committing that criminal offence, he was none the

(1) 2 H. Bl. 527.

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less doing that criminal offence because he was on the highway; but they could not take exception and say he had a right to be there as he had for all purposes, and try to make that a defence for being there for a criminal purpose." In my opinion that is not the ground of the decision. The ground of the decision is that Pratt was using the highway for purposes other than those of legitimate travel, and was, therefore, a trespasser on the soil and freehold of the adjoining owner; he could not have been convicted unless he had been a trespasser.

The conclusion which I draw from the authorities is that, if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public.

If this is the law, the plaintiff, on the admitted facts, was a trespasser. He was using the soil of the highway, not for the purpose of passing and repassing, but for the purpose of interfering with the exercise of a legal right by the defendant, the Duke of Rutland. In these circumstances the defendants are entitled to judgment on the pleas of justification, and also on their counter-claim for nominal damages. The plaintiff's appeal will, therefore, be dismissed, and the defendants' appeal be allowed with costs. Sir H. James, on the part of the Duke, does not press for an injunction; if he had I should have thought it ought to be granted; but he asks for a declaration that the plaintiff, on the facts appearing, was, at the time when he interfered with the legal right of the Duke, a trespasser. This I think he ought to have. An injunction is constantly granted by the Queen's Bench Division for trespasses threatened to be repeated. It is the effect of the Judicature Act and a most wholesome remedy. This action might have been brought in the Court of Chancery, and an injunction on the facts appearing would, in my opinion, have been readily granted; and under Order xxv.,

r. 5, there is full power to make a declaration such as we make.

KAY, L.J. The soil of a highway belongs primâ facie to the owner of the land adjoining it. If the land on either side is the property of different owners, each is owner of the soil on his side ad medium filum of the highway. But this ownership is subject to the right of the public to use the highway. Any use of the soil of the highway other than the legitimate use of it for the purposes of a highway is a trespass upon that soil as against the owner to whom it still belongs. These propositions are amply established by judicial decisions. The only difficulty in applying them is in determining whether the particular act complained of is or not a user of the soil as a highway.

The legitimate use of a highway is generally described as a "right of passage," or a "right of passing and repassing." In 1 Rolle's Abridg. 392 B, pl. 1, 2, referred to and adopted by Lord Mansfield in *Goodtitle* v. *Alker* (1), the law as to highways is thus stated: "The King has nothing but the passage for himself and his people, but the freehold and all profits belong to the owner of the soil." In the last-mentioned case it was held that trespass would lie for any interference with the owner's rights in the soil of a highway, and that he may maintain ejectment for an exclusion as by a building upon the soil of the highway. In *Sir John Lade* v. *Shepherd* (2), an action of trespass was brought by the owner of the soil for building a bridge across a ditch, "the end whereof rested on the highway." The plaintiff had judgment, the Court saying: "It is certainly a dedication to the public so far as the public has occasion for it, which is only for a right of passage. But it never was understood to be a transfer of the absolute property in the soil." Following these decisions, the grass or trees growing on the sides of the highway are held to be the property of the owners of the soil: *Turner* v. *Ringwood Highway Board* (3); *Curtis* v. *Kesteven County Council*. (4)

The right of the public upon a highway is, in the language of

(1) 1 Burr. 133, at p. 143.
(2) 2 Str. 1004.
(3) Law Rep. 9 Eq. 418.
(4) 45 Ch. D. 504.

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the judges which I have quoted, described as a right of passage. In other cases it is defined as a right of passing and repassing. Probably this is sufficiently accurate and precise to enable any one to determine what in each particular instance is an improper use of the soil. Many of such instances may be too trivial to justify any action or prosecution. That is so in the case of every trespass. If a man walks into the field of another without permission, he is a trespasser; but an action for such a trespass, unless it were in assertion of a fancied right, would not be very likely to succeed. So, if by the side of a highway an artist set up his easel and made a sketch, he might be a trespasser. But no one in his senses would bring an action against him for an occasional trespass of that kind. There is no more danger of abuse of the law in the one case than in the other, and it is no argument against this well-settled law relating to highways to say that it is capable of such abuse. The answer is that the law of trespass, whether on the soil of a highway or on land over which the public have no rights at all, may be pushed to an extreme in certain cases. But the discretion of a Court of Justice is as capable of controlling any excessive assertion of right in the case of a highway as in any other case.

The other reported instances of trespass deserve consideration. In *Dovaston* v. *Payne* (1) cattle were taken by the defendant damage feasant on his land, which adjoined to a highway. It was pleaded that, being on the highway, they had escaped into the land by reason of the owner not having kept the fence which divided it from the road in repair. The plea was held bad because it did not aver distinctly that the cattle were using the highway for the purpose of passing and repassing. So that they might have been trespassing upon it, and an escape from land on which they were trespassing would not be a defence. Heath, J., said that it was no excuse that the fences were out of repair if the cattle were trespassers, and it was necessary to shew that they were lawfully using the road; for "the property is in the owner of the soil subject to an easement for the benefit of the public," and on the plea it did not appear "whether the cattle were passing and repassing, or whether they were trespassing on the

(1) 2 H. Bl. 527.

highway." In *Stevens* v. *Whistler* (1) it was held by the Court of King's Bench that depasturing cattle upon a highway on one side of which the plaintiff had land was a trespass on that part of the soil of the highway which belonged to the plaintiff. In *Reg.* v. *Pratt* (2) it was decided that a person who went upon the high road with a gun, and attempted to shoot a pheasant which flew over it, was properly convicted of a trespass in search of game under 1 & 2 Wm. 4, c. 32, s. 30, upon the soil of the highway which belonged to the owner of the close adjoining such highway. "He was on land," said Lord Campbell, C.J., "the soil and freehold of which was in the owner of the adjoining land. It is true the public had a right of way there, but subject to that right the soil and every incident to the ownership of the soil was in" the owner of the adjoining land. Wightman, J., said: "Though the public have a right to pass and repass on land which is a highway, they have no right to use the land for any other purpose than as a highway, and the appellant being on such land in pursuit of game was primâ facie a trespasser." Erle, J., said: "It is said he could not be a trespasser because it was a highway. But I take it to be clear law that if, in fact, a man be on land where the public have a right to pass and repass, not for the purpose of passing and repassing, but for other and different purposes, he is in law a trespasser like the cattle in *Dovaston* v. *Payne*." (3) Crompton, J., said: "If a man use the land over which there is a right of way for any purpose lawful or unlawful other than that of passing and repassing he is a trespasser." These authorities were considered and followed by the Court of Queen's Bench in *St. Mary Newington* v. *Jacobs* (4), where the law is stated thus: "The owner who dedicates to public use as a highway a portion of his land parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith." Mellor, J., who delivered the judgment of the Court, comments thus on *Reg.* v. *Pratt* (2): "Whether or not that case is open to doubt as to the construction put upon the Game Act, it truly expresses, as we think, the true limit of the public rights over a highway." The

(1) 11 East, 51.
(2) 4 E. & B. 860.
(3) 2 H. Bl. 527.
(4) Law Rep. 7 Q. B. 47.

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Court held that the owner of premises adjoining a highway, who had offered to take up the flags of a footpath and replace them by hard materials to enable him to cart heavy machinery into his yard, was not liable for damage done to the flags by carting the machinery over them, when his offer had been refused.

According to these authorities, the right of the public upon a highway is that of passing and repassing over land the soil of which may be owned by a private person. Using that soil for any other purpose lawful or unlawful is a trespass. I understand those words to mean that the purpose need not be unlawful in itself; as for example, to commit an assault or a felony upon the high road. It is enough that it should be a user of the soil of the high road for a purpose other than that which is the proper use of a highway, namely that of passing and repassing along it.

The peculiarity of the decision in *Reg.* v. *Pratt* (1) is that the trespasser was passing along the highway, but his purpose in doing so made that passing a trespass. The purpose, however, was to do an act upon the highway itself which was beyond his right merely to pass and repass. If he had gone along the highway with the purpose of reaching a covert near the highway and taking game in that covert, though he might be a trespasser in that covert, I should not think he was a trespasser upon the highway. But, if a man goes along a highway for the purpose of cutting down the trees or bushes which grow along the side of it, or taking the grass, or setting up a show upon the highway, or doing upon the highway itself—in the words of Crompton, J.—any act "lawful or unlawful other than that of passing and repassing, he is a trespasser." The words must be read with the obvious qualification that the "purpose" they refer to must be a purpose of using the soil of the highway itself otherwise than by merely passing and repassing.

In this case the highway was a cart and carriage-road across a moor. The Duke of Rutland had the right of sporting over the moor. The soil in it and in the highway, I understand, belonged to him. He had butts, in which people stood to shoot grouse

(1) 4 E. & B. 860.

driven over them from the moor. These butts were some two hundred yards from the road, so that shooting from them would not infringe the provisions of s. 72 of 5 & 6 Wm. 4, c. 50, which prohibits any person from wantonly firing off any gun within fifty feet of the centre of any carriageway or cartway. Some old butts were within the prohibited distance. It was proved that the plaintiff went upon this high road during a grouse drive for the express purpose of preventing the grouse from flying towards the butts, and thus interfering with the right of sporting which was being exercised by the Duke's friends. On this point the evidence was so conclusive that we are told the Lord Chief Justice said it was superfluous to produce any more witnesses to prove it. The keepers seized the plaintiff, threw him down upon the road, and held him there during the grouse drive, to prevent his further interference.

The Lord Chief Justice directed the jury that the plaintiff was not trespassing. Under that ruling they found that a nominal sum of 5*s.* paid into Court was sufficient damages for the assault upon him. Counsel then said that, after his Lordship's ruling, he could hardly press the counter-claim, which asserted that the act of the plaintiff was a trespass, and sought for an injunction to restrain the plaintiff from repeating it. This counter-claim is in fact a cross-action seeking equitable relief, which may now be brought in the Queen's Bench Division: see s. 24, sub-s. 3, Judicature Act, 1873. Where a trespass is committed in assertion of a fancied right, and it is shewn that it will be repeated unless prevented, the Court of Chancery has constantly granted injunctions to prevent a repetition of the trespass.

Upon this point there is now before us a cross-appeal by the defendants. They asked for an injunction; but, upon being pressed by me, counsel said he would not insist upon the injunction, but desired the decision of this Court by declaration whether or not the act of the plaintiff was a misuse of the soil of the highway which amounted to a trespass. It is not unusual in the Chancery Division to make such a declaration without going on to grant an injunction. It clearly may be done under Order xxv., r. 5.

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Whatever may be thought of the so-called sport of standing in a butt and shooting at grouse driven over, it is not prohibited by law; and, subject to the provisions of the statute to which I have referred for the protection of wayfarers upon the high road, it is a not unlawful exercise of the right of the owner of the land.

The plaintiff went upon this highway, not for the purpose of exercising as one of the public his right of passage, but of interfering with the grouse drive by placing himself upon the soil of the highway so as to prevent the grouse from flying over the butts. In his own language, taken from his evidence, he says: "I certainly meant to take up my position in front of the butts": "I went there to defend the public right." With great deference, I am unable to agree that this was a use of the right of passing along the highway. I think it was an abuse of that right. In other words, it was a use of the soil of the highway for another purpose, which use interfered, and was intended to interfere, with a right which was then being exercised by the owner of the soil, and was incident to that ownership. Such a misuse of the soil of a highway is a trespass. There seems to have been sufficient evidence that the plaintiff was not only asserting a right to do what he did, but also that his intention was to repeat his interference. This strictly would entitle the defendants to the assistance of the Court by injunction to prevent a repetition of the act. But this is not pressed for; and I think that the defendants are entitled at any rate to a declaration under Order XXV., r. 5, upon their counter-claim, that under the circumstances the plaintiff, upon October 8, 1890, when stopped by the Duke's keepers, was trespassing upon the soil of the highway. I am not so much impressed with the consequences of granting an injunction. The Court exercises the power of enforcing such an order by imprisonment with very great care and caution.

The damages given to the plaintiff for the alleged assault upon him by the keepers on the assumption that he was not a trespasser were only 5*s*. They would not be more on the ruling that he was a trespasser, and the defendants do not ask to alter the amount. The plaintiff's appeal fails, and must

be dismissed. The defendants' appeal succeeds. Plaintiff's claim is dismissed with costs. The defendants' counter-claim is allowed with costs.

Judgment accordingly.

Solicitors for plaintiff: *Hood Barrs & Co.*

Solicitors for defendants: *Eyre & Co.*

E. L.

[IN THE COURT OF APPEAL.]

RODGER *v.* HARRISON AND OTHERS.

Registry Acts (*Yorkshire*)—*Agreement for Sale of Land*—"*Assurance*"—"*Conveyance*"—"*Memorandum of Charge*"—*Yorkshire Registries Act*, 1884 (47 & 48 *Vict. c.* 54), *ss.* 3, 4, 14.

A memorandum of agreement for the sale of land stated that, in consideration of 200*l.* then paid by the purchaser, the vendor agreed to complete certain buildings on the land, and the purchaser agreed to purchase the same when completed at the price of 750*l.*, the above sum of 200*l.* to be considered as in so much reduction of the purchase-money:—

Held, that such memorandum was not an "assurance" capable of registration within the meaning of the Yorkshire Registries Act, 1884.

APPEAL from the judgment of a Divisional Court (Mathew and Bruce, JJ.) upon a special case stated in an action pursuant to Order XXXIV., rr. 1, 2.

The special case was in substance as follows:—

The action was commenced by a writ of summons whereby the plaintiff claimed a declaration that he was entitled to have the premises comprised in a contract dated June 7, 1889, and made between Squire Naylor of the one part, and the plaintiff of the other part, transferred to him and the title deeds relating thereto delivered to him.

By indenture dated April 11, 1889, Squire Naylor of Stanningley, near Leeds, mortgaged to the Leeds Provincial Building Society, as security for the repayment of a sum of 1500*l.* and interest as therein provided, certain properties, comprising (inter alia) a parcel of land situate at Swinnon in Bramley, in the parish of Leeds aforesaid.

By another indenture, also dated April 11, 1889, the same parcel of land was conveyed by the said Squire Naylor to the

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defendants by way of mortgage to secure the principal sum of 240*l.* with interest thereon at the rate of 5 per cent. per annum. This indenture was duly registered in accordance with the provisions of the Yorkshire Registries Act, 1884, and the Acts amending the same, on August 31, 1889.

By an agreement in writing made June 7, 1889, between the said Squire Naylor and the plaintiff, in consideration of 200*l.* then paid by the plaintiff to the said Squire Naylor, the latter agreed to complete certain buildings on the said parcel of land and the plaintiff agreed to purchase the said buildings when completed at the price of 750*l.*, the above sum of 200*l.* to be considered as in so much reduction of the purchase-money.

The plaintiff accepted the title of the said Squire Naylor to the property comprised in the last-mentioned agreement; but the plaintiff did not pay the balance of the purchase-money or sum of 750*l.* in consequence of the refusal by the Leeds Provincial Building Society to convey the property to him, and no conveyance of the property was executed in his favour. The buildings were duly completed in accordance with the agreement by the mortgagees, the Leeds Provincial Building Society.

On August 29, 1889, the defendants for the first time received notice of the agreement of June 7, and on the same date, by a letter addressed to the plaintiff's solicitor, gave him notice of their mortgage of April 11, 1889. On August 30, 1889, but before the receipt by the plaintiff's solicitor of the said letter, the plaintiff procured the agreement of June 7 to be registered at Wakefield.

In the month of September, 1889, the plaintiff tendered to the Leeds Provincial Building Society the amount due to them for principal, interest, and costs in respect of their mortgage, and requested them to execute a conveyance to him of the legal estate in the mortgaged premises (subject as to the portion thereof in which the equity of redemption was vested in any person other than the plaintiff to such equity of redemption) and to deliver up to him the title deeds relating thereto; but the society refused to execute any conveyance of the premises to the plaintiff or to deliver up to him the title deeds.

The plaintiff then commenced an action in the Queen's Bench

Division against the society, claiming a declaration that he was entitled to have the premises comprised in the society's mortgage conveyed to him (subject as in the last paragraph mentioned) and the title deeds relating thereto delivered to him, and an order requiring the said society to convey the premises to him (subject as aforesaid), and to deliver up to him the said title deeds; in which action an order was made on November 28, 1890, by a master, that, upon the society undertaking to sell the property, the subject-matter of the action, by auction forthwith, and on payment of the purchase-money by the society's solicitors into Court (to abide further order), after deducting thereout the mortgagees' costs together with the society's costs of the said action to be taxed, all further proceedings should be stayed.

By arrangement with and with the consent of all parties the sum of 247*l.* 6*s.* 1*d.*, being the balance of the said purchase-money, was allowed to remain in the hands of the society.

It was contended by the plaintiff that he was entitled to the balance of the said purchase-money as representing the premises comprised in the above-mentioned contract of June 7, 1889, on the ground that such contract was registered before the mortgage to the defendants. On the other hand, it was contended by the defendants, (1.) that the registration of the said contract was improper and invalid, and consequently conferred no priority on the plaintiff over the defendants' mortgage of April 11, 1889, and (2.) that, even if such registration was proper and valid, the plaintiff did not by the mere fact of such registration under the circumstances hereinbefore stated acquire any right or interest in the property or in the proceeds of sale thereof in priority to the defendants' mortgage.

The questions submitted for the opinion of the Court were—

(1.) Whether the agreement of June 7, 1889, was an "assurance" entitled to be registered within the meaning of the Yorkshire Registries Act, 1884, s. 14;

(2.) If it were such an assurance, then whether under the circumstances hereinbefore appearing the plaintiff was entitled to the proceeds of sale of the property comprised in such agreement, or any part thereof, in priority to the defendants' mortgage of April 11, 1889.

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The Divisional Court held that the first question must be answered in the affirmative, and therefore that the plaintiff was entitled to priority.

P. B. Abraham, for the defendants. The agreement of June 7, 1889, is not a document which is entitled to registration under s. 4 of the Yorkshire Registries Act, 1884. (1) It is not an "assurance" within the meaning of ss. 4 and 14 of the Act. It is only an agreement for the sale and purchase of land, and does not come within the definition of assurance given in s. 3. It is clearly not a "conveyance": it is not "made by deed." Nor is it a "memorandum of charge." It is not such a "memorandum of lien or charge" as is entitled to registration under s. 7. There is no lien "in respect of any unpaid purchase-money or by reason of any deposit of title deeds."

The plaintiff is really attempting to get for 200*l.* that for which he agreed to pay 750*l.* Even if the agreement was en-

(1) By s. 3 of the Act: "In this Act, unless the context otherwise requires (inter alia)—

"The expression 'conveyance' includes any assignment, appointment, lease, or settlement made by deed on a sale, mortgage, demise, or settlement of any land or appointment of a new trustee in respect thereof, which has been executed by one or more of the parties by whom any interest in such land is thereby conveyed.

"The expression 'memorandum of charge' shall include any memorandum of a lien or charge on any land which may be registered under the provisions of this Act.

"The expression 'assurance' shall include any conveyance, enlargement of term into fee simple, memorandum of charge, &c."

Sect. 4: "From and after the commencement of this Act, and subject to the provisions of this Act and any rules made under this Act, all assurances executed or made after the commencement of this Act . . . . by which any lands within any of the three ridings are affected, may be registered under this Act."

By s. 7: "Where any lien or charge on any lands within any of the three ridings is claimed in respect of any unpaid purchase-money, or by reason of any deposit of title deeds, a memorandum of such lien or charge, signed by the person against whom such lien or charge is claimed, may be registered by any person claiming to be interested therein . . . . and no such lien or charge shall have any effect or priority as against any assurance for valuable consideration which may be registered under this Act, unless and until a memorandum thereof has been registered in accordance with the provisions of this section."

By s. 14: "Subject to the provisions of this Act, all assurances entitled to be registered under this Act shall have priority according to the date of registration thereof, and not according to the date of such assurances, or of the execution thereof."

titled to registration, and is entitled to priority by reason of the registration, still the plaintiff cannot claim the 247*l.* 6*s.* 1*d.*, as representing the land, until he has paid the whole of the 750*l.* purchase-money which he agreed to pay. This he has not done.

Lyon, for the plaintiff. The agreement of June 7 comes within the Yorkshire Registries Act, 1884, either as being a "conveyance" or as being a "memorandum of charge."

The agreement is a "conveyance" within the ordinary meaning of that term. The definition in s. 3 is not exhaustive; it only says that the word "includes" certain things. It does not exclude the right to register a conveyance which is not made by deed.

The effect of such an agreement as this is that the beneficial interest in the land is in equity conveyed to the purchaser: see *Lysaght* v. *Edwards*. (1)

[KAY, L.J. In that case the question was what passed under a devise. No doubt, for certain purposes, an inchoate equitable interest in land is created by a valid contract for sale. The question here is what the term "conveyance" means in this Act. It seems to me incredible that, if the legislature had meant that the term should include a contract for sale, it should not have expressly said so, seeing that it specifies various other instruments as being included in the term.]

In *Credland* v. *Potter* (2) it was held that an equitable mortgage by memorandum and deposit of title deeds was a conveyance within the West Riding Registry Act (2 & 3 Anne, c. 4), and, therefore, that the memorandum could be registered.

Secondly, it is contended that this agreement is a memorandum of charge within the meaning of the Act. It appears on the face of it that the purchaser has paid 200*l.* on account of the purchase-money, and that to that extent he has, or may have, a lien on the land. That there is such a lien in favour of the purchaser is shewn by *Wythes* v. *Lee*. (3)

[He also cited *Kettlewell* v. *Watson* (4); *In re Wight's Mortgage Trust* (5); *Torrance* v. *Bolton*. (6)]

(1) 2 Ch. D. 499.
(2) Law Rep. 10 Ch. 8.
(3) 3 Drew. 396; 25 L. J. (N.S.) (Ch.) 177.
(4) 26 Ch. D. 501.
(5) Law Rep. 16 Eq. 41.
(6) Law Rep. 14 Eq. 124; 8 Ch. 118.

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P. B. Abraham, in reply.

LORD ESHER, M.R. The question raised by this case is, whether the agreement of June 7, 1889, is an "assurance" entitled to be registered within the meaning of the Yorkshire Registries Act, 1884, s. 14. By that agreement, which was in writing, in consideration of 200*l.* then paid by the plaintiff to Naylor, the latter agreed to complete certain buildings on the land in question, and the plaintiff agreed to purchase the said buildings when completed at the price of 750*l.*, the sum of 200*l.* being to be considered as in so much reduction of the purchase-money. The agreement, therefore, which must be taken not to have been under seal, was an agreement for sale and purchase of the buildings, and, of course, of the land on which they stood, subject to conditions. It was a conditional agreement for the purchase of the land after the vendor had completed the buildings; and, secondly, this being an agreement for the sale of land, the ordinary condition would be imported that the vendor must make out a good title before he could call upon the purchaser to complete the contract. There were, therefore, conditions to be fulfilled before the purchaser could be called upon to accept a conveyance of the land. The question asked of us is whether such an agreement is an "assurance" within the meaning of the Yorkshire Registries Act. The answer to that question depends on the terms of the Act. The section which provides for registration is the 4th section, which enacts that, from and after the commencement of the Act, and subject to its provisions, all "assurances" executed or made after the commencement of the Act, by which any lands within any of the three ridings are affected, may be registered under the Act. In order, therefore, that the section may apply, there must be an "assurance" by which lands are affected. Is a conditional agreement for the sale and purchase of land, when certain conditions are fulfilled, an "assurance" in the ordinary sense of the word as used by conveyancers and lawyers? I have not heard it suggested that it is. But the Act says that the expression "assurance" shall include, among other things, any "conveyance" or "memorandum of charge." If the Act stopped there,

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the case would depend on the question whether this agreement was a conveyance or a memorandum of charge in the ordinary sense of the term. Is it, then, a "conveyance" in the ordinary sense of the term? I do not think that it can be seriously argued that it is. I do not think that the ordinary use of the term would include such an instrument. Then is it a memorandum of charge in the ordinary sense of the term? The term "memorandum of charge" must, I think, in its ordinary sense, import that there is an existing charge, and that there is a memorandum of it. I do not see how this instrument could be a memorandum of charge in that sense. But we are driven by the Act to look further. The Act interprets not only "assurance" as including "conveyance" and "memorandum of charge," but it also interprets the expressions "conveyance" and "memorandum of charge." Therefore, "assurance," for the purposes of the Act, includes that which is a conveyance either in the ordinary sense of the term, or in the enlarged meaning given to the term by the Act. The meaning of the word "include" in such a definition as is given in this Act seems to be this. The word interpreted has its ordinary meaning. That meaning it still has in the Act. But then there are other meanings that the legislature wishes it to have in the Act. So the definition is used to enlarge the meaning of the term beyond its ordinary meaning and make it include matters which the ordinary meaning would not include. But this enlargement of meaning is confined to the matters expressly mentioned in such definition. The term "conveyance" is made by this Act to include an "assignment, appointment, lease, or settlement made by deed." None of these terms include such an instrument as this. I have already said that I do not think it is included in the natural meaning of the term "conveyance." So this agreement cannot be brought within either the ordinary meaning of the term "conveyance," or within its meaning as expanded by the interpretation section. It was said that in *Credland* v. *Potter* (1), Lord Cairns had, in relation to this subject-matter, given to the word "conveyance" a meaning beyond its ordinary meaning, and had extended it to an equitable mortgage by memorandum

(1) Law Rep. 10 Ch. 8.

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and deposit of title deeds. If the Act there in question were to come before us, and we had to give a meaning to the term "conveyance" as used in it, it probably may be that we should think it right to follow Lord Cairns' decision in that case. But I do not think the interpretation put on that Act is any authority for the interpretation to be put on the Act now in question. If he had been giving an interpretation of the term "conveyance" as ordinarily used in common law or equity law, apart from statute, his view might be important; but, as he was only deciding upon the meaning of the word as used in an Act which is not this Act, I do not think his decision helps us much. In relation to this Act, I think it is impossible to say that this agreement is a conveyance. If it was a conveyance, when was it so? Was it so when it was signed? If not, then what is there to make it so afterwards?

Then it was argued that it was a memorandum of charge. As I have said, I think that in its ordinary sense that term must mean that there is a charge and a memorandum of that existing charge. Is there, then, a charge existing under this document, and is this document a memorandum of it? The effect of the agreement is that, when certain conditions are performed by the vendor, he is to convey, and, unless those conditions are performed, the purchaser is not bound to take the land at all. It may be that in certain contingencies, if these conditions are not fulfilled, a charge may arise; but this agreement is not a memorandum of that charge. But then the Act says that the term "memorandum of charge" shall include "any memorandum of a lien or charge on any land which may be registered under the provisions of this Act." These latter words seem to refer to s. 7. But that section cannot be made applicable to this case, because that section is confined to cases of vendors' liens for unpaid purchase-money and charges by reason of deposit of title deeds. In this case the lien suggested is a purchaser's lien for part of the purchase-money paid in advance. It does not seem to me that there is a memorandum of charge in this case either in the natural meaning of the word or that given by the interpretation section. For these reasons I do not think it possible to say that this document can be registered under the Act. Therefore, this appeal must be allowed.

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LOPES, L.J. The question in this case is whether a conditional agreement for the sale of an equity of redemption is an instrument capable of registration within the meaning of the Yorkshire Registries Act, 1884. The counsel for the plaintiff says that this document is either a "conveyance" or a "memorandum of charge." Sect. 4 of the Act specifies what may be registered. It says that all "assurances" executed or made after the commencement of the Act, by which any lands within any of the three ridings are affected, may be registered. The first question, therefore, is whether this is an "assurance." Sect. 3 provides that the expression "assurance" shall include, among other things, any "conveyance" or "memorandum of charge." But then we are compelled to look further, because the terms "conveyance" and "memorandum of charge" are themselves defined. It is provided that the expression "conveyance" shall include "any assignment, appointment, lease, or settlement." I read that as meaning that, in addition to its ordinary meaning among lawyers, the term is to include these matters. But then there come the important words, "made by deed." It seems to me impossible, having regard to those words, to say that this agreement is a "conveyance" within the meaning of the Act. Some difficulty was created in my mind by what Lord Cairns said in *Credland* v. *Potter*. (1) But I think, when that case is carefully examined, the difficulty is removed. Lord Cairns, no doubt, in that case gave a somewhat extended meaning to the word "conveyance"; but, if the Act there in question is looked at, it will be found that the words are different; it used the words "deed or conveyance." There was no definition clause in that Act like that in this, in which we find that certain things are to be included in the term "conveyance" if made by deed. I think it might well be held under that Act that an equitable mortgage by memorandum and deposit of deeds was within the term "conveyance" as used there; but it seems to me impossible, having regard to the words "made by deed" in this Act, to bring this document within it. The term "conveyance" is well known to conveyancers as meaning an instrument which passes a freehold interest in real property. It may perhaps include other

(1) Law Rep. 10 Ch. 8.

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things, but I think that in its ordinary use it implies that the document is under seal.

Then it was argued that, if this document does not come within the term "conveyance," it comes within the term "memorandum of charge." In connection with this expression, it is material to consider the particular section which seems applicable to such memorandums, viz., s. 7. That section provides that, "where any lien or charge on any lands within any of the three ridings is claimed in respect of any unpaid purchase-money or by reason of any deposit of title deeds, a memorandum of such lien or charge signed by the person against whom such lien or charge is claimed, may be registered by any person claiming to be interested therein." In the present case, the lien suggested is not for vendor's unpaid purchase-money, but in respect of money paid by the purchaser. Bearing that in mind, when we look at the interpretation of "memorandum of charge" in s. 3, we find that it is to include any memorandum of a lien or charge which may be registered under the provisions of the Act. It is clear, therefore, that this agreement is not within the interpretation. I do not think that this document can be said to be a memorandum of charge within the meaning of the Act. For these reasons, I think that the judgment of the Court below cannot be maintained.

KAY, L.J. I am of the same opinion. The 4th section of the Act in question provides that, from and after the commencement of the Act, "all assurances executed or made after the commencement of this Act," by which any lands within any of the three ridings are affected, may be registered under the Act. Without going further into the Act, I think that it would never enter into the mind of a conveyancer that a contract for the sale of land could be treated as an "assurance" of that land. It is true that it was said in *Lysaght* v. *Edwards* (1) that, when a contract for the sale of land is valid and binding, it does create an equitable interest in the land. But that is created by the contract itself, not by the memorandum, which is merely evidence of the contract. There must be a memorandum in writing to satisfy the

(1) 2 Ch. D. 499.

Statute of Frauds; but how that memorandum can itself be treated as an assurance of the land, I cannot see. But it is unnecessary to dwell on that, because the Act itself gives some definition of the term "assurance." The term is by s. 3 to include, among other things which need not be referred to, any "conveyance" or "memorandum of charge." Of course a conveyance is an assurance, and this clause seems to mean that, in addition to its primary meaning of conveyance, it is to include the other things mentioned. It has been argued that the document now in question comes within the term "conveyance" or within the term "memorandum of charge." I will deal with the terms separately. The first question then is, whether a memorandum of agreement for the sale of land, on which a deposit of part of the purchase-money has been paid, is in the language of conveyancers or other legal persons a "conveyance." I have never heard such a document called a conveyance. There is, so far as I know, only one case, as to which I will say something presently, in which a memorandum evidencing a contract as to land has ever been spoken of as a "conveyance." We are not left entirely without guidance on this point by the statute itself, for it interprets the term "conveyance." Sect. 3 provides that the expression shall include "any assignment, appointment, lease, or settlement made by deed on a sale, mortgage, demise or settlement of any land or appointment of a new trustee in respect thereof." It is to be observed that all the things which are said to be included must be made by deed. It was pointed out that the section does not define "conveyance," but only provides that it shall include certain things. That is quite true. It leaves the original meaning of the word untouched, and only says that it shall include certain other things. But I think that we may gain some guidance as to the original meaning of the word as used in the Act from the words of the interpretation clause, which says what it shall include. It is to include an assignment, appointment, &c.; but it is not to include a mere contract for an assignment or an appointment; on the contrary, such assignment or appointment must be made by deed. How is it a reasonable construction that, for the purposes of the Act, the meaning of the term "conveyance" shall include a contract for

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conveyance, yet, when its meaning is extended to an assignment in the case of a leasehold interest and an appointment which may be of a freehold interest, it shall not be allowed to include a contract for such an appointment or assignment? These, however, are by the terms of the interpretation clause excluded. I think that, except so far as it is extended by that clause, the term "conveyance" must have its ordinary meaning among conveyancers, viz., of a deed by which a freehold interest in land is actually transferred from one person to another. That my view in this respect is correct is, I think, confirmed by the fact that the plaintiff's counsel has not succeeded in finding any case in which it has been held or intimated that under the Statute of Anne or this Act the term "conveyance" includes a contract for the sale of land. The only case upon which reliance was placed by the plaintiff's counsel on this point was *Credland* v. *Potter*. (1) In that case there had been a mortgage by deed which passed the legal estate; afterwards there was a further charge made by way of memorandum which acknowledged that the mortgagees held the deeds, including, I suppose, the mortgage deed itself, for the purpose of securing a further sum of money in addition to the sum secured by the previous mortgage. There could not in that case be any conveyance of the legal estate; all that was intended to be done, and that could be done, was to give a charge on that estate in addition to that which the original mortgage would have covered. Lord Cairns, L.C., dealing with the statute 2 & 3 Anne, c. 4, the language of which differs essentially from the language of the Act now in question, held that the word "conveyance" in that Act might include that further charge which did charge the equity of redemption with a further sum of money. It was enacted by s. 1 of that Act that "a memorial of all deeds and conveyances" executed after a certain date, of, or concerning, or whereby any lands, &c., in the West Riding might be in any way affected in law or equity, might be registered; and that "every deed or conveyance" that should be, at any time after any memorial was so registered, executed in respect of the lands, &c., comprised in any such memorial, should be adjudged fraudulent and void against any subsequent

(1) Law Rep. 10 Ch. 8.

purchaser or mortgagee for valuable consideration, unless such memorial thereof should be registered as in the Act directed before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee should claim. It is impossible not to see that as used in that Act the word "conveyance" might include something not by deed, such as an equitable charge by memorandum and deposit of deeds; so that a ground was laid for the language of Lord Cairns when he said, "There is no magical meaning in the word 'conveyance'; it denotes an instrument which carries from one person to another an interest in land." Further on he refers to and seems to rely on the words "deed or conveyance" used in the Act. In the first place, that was a decision on the meaning of a very different Act of Parliament, and, therefore, is no authority upon the meaning of this Act; and, again, that case did not go so far, and there is no case that ever did go so far, as to say that even under that Act a mere contract for the purchase and sale of lands could be registered as a conveyance. So I come to the conclusion that the word "conveyance" in this act is not intended to include such a document as a mere memorandum in writing of a contract for sale.

I might almost stop here, because the special case does not appear to me distinctly to raise the other question, viz., whether this document is a memorandum of charge. To raise that question it lies on the purchaser to make out that there is, under the circumstances which have arisen, a charge. He says that he paid a sum of 200*l.* as deposit, and now the contract has gone off. As a fact, I understand that the property has been sold by the first mortgagees, and the only question now is as to the balance of the purchase-money after satisfying their debt. The purchaser says that, under the circumstances which have happened, he is entitled to a charge on the property in respect of the deposit. But a purchaser is only entitled to such a charge where the sale goes off by default of the vendor, and then only from the moment when the default happens, and when he can by reason of the default of the vendor no longer obtain specific performance of the contract. There is really no statement in this special case that that state of things exists here. But, again, assuming that the

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question is really raised, the answer to the plaintiff's contention is this. If there be a lien for the purchase-money paid, when does that lien come into existence? Certainly not at the date of the contract. It cannot then be assumed that the contract will go off by default of the vendor. The purchaser's right then is to have the land itself. How can it be supposed that this Act intended that the purchaser directly he enters into a contract for purchase of land, of which he obtains a memorandum in writing, should register that memorandum as a memorandum of a charge that may arise in case the contract should go off by default of the vendor? The words of the Act appear to me to afford very distinct guidance on this point. The Act says that the expression "memorandum of charge" shall include "any memorandum of a lien or charge on any land which may be registered under the provisions of this Act." When we look to s. 7 we find a distinct provision that a memorandum in respect of a vendor's lien may be registered; but nothing is said about the possible and contingent lien of a purchaser. Therefore it seems to me that, if the second point is raised, it fails equally with the first point. For these reasons I think the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *Few & Co.*

Solicitors for defendants: *Paterson, Snow, Bloxam, & Kinder.*

E. L.

IN RE POLLITT. EX PARTE MINOR. 1892

Nov. 7, 8.

Bankruptcy—Assets—Relation of Trustee's Title—Money paid to Solicitor—Money handed by Debtor to Solicitor as Security for future Costs—Claim to retain for Services rendered after Act of Bankruptcy—Mutual Dealings—Set-off—Claim to set off Debt for Past Services against Claim of Trustee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 38.

A debtor consulted a solicitor to whom he was then indebted for costs. The solicitor declined to act further unless he were furnished with money to meet future costs, and the debtor placed money in his hands for that purpose. The solicitor then called the debtor's creditors together, and prepared a deed of assignment, which the debtor executed. The debtor was afterwards adjudged bankrupt, the act of bankruptcy being the execution of the deed of assignment.

On an application for payment to the trustee in bankruptcy of the money in the hands of the solicitor :—

Held, that the solicitor was not entitled to retain the money as payment for services rendered by him to the debtor after the execution of the deed of assignment:

Held, also, that there had not been mutual dealings between the debtor and the solicitor within the meaning of s. 38 of the Bankruptcy Act, 1883, and, therefore, the solicitor could not set off against the claim of the trustee a debt due to him from the debtor for professional services rendered before the money was placed in his hands.

In re Sinclair, Ex parte Payne (15 Q. B. D. 616) distinguished.

APPEAL, by leave, from the county court at Manchester.

The order appealed from directed the appellant, Mr. Minor, a solicitor, to pay over to the official receiver acting as trustee in the bankruptcy a sum of 12*l.* 3*s.* 4*d.*, which was in the possession of the appellant under the following circumstances :—

The appellant had acted as solicitor for the debtor, and in December, 1891, about 40*l.* was due from the debtor to the appellant for costs in respect of professional services previously rendered.

On December 11, the debtor, being in difficulties, called upon the appellant to consult him as to his affairs. The appellant declined to act unless he were furnished with money to meet future costs. The debtor then obtained a sum of 15*l.*, which he handed over to the appellant to secure any costs that might be incurred. The appellant then acted for the debtor, and caused his creditors to be called together, and prepared a deed of

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assignment, which the debtor executed on December 12. Afterwards the debtor was adjudged bankrupt, the act of bankruptcy alleged in the petition being the execution of the deed of assignment of December 12. The sum now in dispute, 12*l.* 3*s.* 4*d.*, was that portion of the above-mentioned sum of 15*l.* which the appellant claimed to be entitled to retain in respect of professional services rendered to the debtor after the execution of the deed of assignment.

Herbert Reed, Q.C., and *Shearman*, for the appellant. The official receiver is not entitled to the money. The appellant, having rendered professional services to the debtor in the management of his affairs, is entitled to retain the money in payment of his costs. The case is concluded by *In re Sinclair, Ex parte Payne.* (1)

Secondly, if the official receiver has any claim, the appellant is entitled, under the mutual credit clause of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38, to set off against it the debt due to him by the bankrupt for costs incurred before the act of bankruptcy.

M. J. Muir Mackenzie, for the official receiver. From the date of the commission of the act of bankruptcy, the money belonged to the official receiver as trustee, and the appellant has no title to it. *In re Sinclair, Ex parte Payne* (1), is distinguishable, for here the costs were incurred, not, as in that case, in resisting hostile proceedings, but in enabling the debtor himself to take proceedings which resulted in his bankruptcy. Moreover, the doctrine of that case ought not to be extended: *In re Spackman, Ex parte Foley.* (2)

There have been no mutual dealings within the meaning of the Act.

Shearman, replied.

[In addition to the authorities above mentioned, the following were referred to: *Ex parte Dewhurst, In re Vanlohe* (3); *Wadling* v. *Oliphant* (4); *Collyer* v. *Isaacs* (5); *Ex parte Edwards, In re*

(1) 15 Q. B. D. 616.
(2) 24 Q. B. D. 728.
(3) Law Rep. 7 Ch. 185.
(4) 1 Q. B. D. 145.
(5) 19 Ch. D. 342.

Chapman (1); *Cohen* v. *Mitchell* (2); *In re Rogers, Ex parte Woodthorpe* (3); *Stumore* v. *Campbell & Co.* (4)]

VAUGHAN WILLIAMS, J. I am of opinion that this appeal ought to be dismissed.

The material facts of the case are these. The bankrupt, being in difficulties, consulted his solicitor, the appellant, to whom he was then indebted in a sum of about 40*l.* for costs in respect of professional services previously rendered. The solicitor said that he would not give his services unless he were paid for future work, and in consequence a sum of 15*l.* was deposited; and afterwards the solicitor acted on behalf of the debtor in preparing a deed of assignment and calling the creditors together. It is common ground that some small services were rendered before the execution of the deed of assignment, and this accounts for the difference between the above-mentioned sum of 15*l.* and the sum of 12*l.* 3*s.* 4*d.* now in dispute. The debtor committed an act of bankruptcy by the execution of the deed of assignment, and was ultimately adjudged bankrupt. After the act of bankruptcy had been committed, and necessarily with full knowledge of the act of bankruptcy, the solicitor rendered to the debtor the services in respect of which he claims to be entitled to retain the balance of the 15*l.* He contends that he is not accountable to the trustee in bankruptcy for this balance, but is entitled to keep it as payment for his professional services; and he further contends that, if this is not so, and if the trustee is rightly claiming the balance of the 15*l.*, there have been mutual dealings between the bankrupt and himself, and that he is entitled to set off against the claim of the trustee the money due to him for services rendered to the bankrupt before the act of bankruptcy. In my judgment, he has neither the one right nor the other. It is admitted that the trustee is entitled to any unexpended balance which there may be of the 15*l.*—that is, any balance in respect of which no services have been rendered; but it is contended that he is not entitled to have the remainder of the money handed over. The authority chiefly relied upon in support of

(1) 13 Q. B. D. 747.
(2) 25 Q. B. D. 262.
(3) 8 Morrell Bank. Cas. 236.
(4) [1892] 1 Q. B. 314.

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the appellant's first contention is *In re Sinclair, Ex parte Payne.* (1) In that case, where proceedings were taken against a debtor with a view to making him bankrupt, it was held that a solicitor was entitled as against the trustee in bankruptcy to retain money paid to him in respect of costs incurred in opposing those proceedings. That decision proceeded on the ground of what I may call legal necessity, for proceedings had been taken against the bankrupt, and it was only just that he should be enabled to defend himself. If the law were otherwise, a debtor against whom bankruptcy proceedings had been commenced would be defenceless. It may be that this exception was first established as matter of authority by *In re Sinclair, Ex parte Payne* (1); but I can remember myself that, as a matter of practice, for years before that case was decided this exception existed. But the exception is one which ought not to be extended. That this is so is clear from the judgment of Cave, J., himself in *In re Spackman, Ex parte Foley.* (2) He says in that case: "Now here to my mind it is quite impossible to say that what was done by these appellants was in any sense a necessary within the principle laid down in *In re Sinclair.* (1) They were engaged in doing the very thing which the trustee of such a deed of arrangement is engaged in doing. In the case of such a deed, the object is to make arrangements by which bankruptcy may be avoided altogether, and the estate withdrawn from the Bankruptcy Court; and we have never yet held that the estate which ultimately finds its way into bankruptcy can be charged with the costs of taking proceedings of that kind." That is precisely what is sought to be done in the present case. But what follows is even more directly in point, for Cave, J., refers to this specific case, and says that the exception is not to be extended. He proceeds as follows: "It would seem to me still more extraordinary if solicitors, who are not trustees under a deed of arrangement, who have no duties imposed upon them, and who know, or ought to know, the law, should be allowed to spend that money which they know will become the money of the trustee, if the petition is presented in due time, in trying to get the creditors to come together and agree not to take pro-

(1) 15 Q. B. D. 616. (2) 24 Q. B. D. 728.

ceedings in bankruptcy. I am therefore of opinion in this case that the facts do not bring the appellants at all within the doctrine of *In re Sinclair* (1), a case which I am certainly not prepared at the present time to extend beyond the lines which were laid down in the case itself in either of the directions in which it is sought to be extended." (2) It is true that the judgment from which I have quoted was reversed in the Court of Appeal, but on another ground, and the Court appears to have agreed with the view of Cave, J., that the doctrine of *In re Sinclair, Ex parte Payne* (1), ought not to be extended. This is not the first time that an attempt to extend that doctrine has been made. In *In re Forster, Ex parte Rawlings* (3), under very similar circumstances, it was ordered that the money should be paid to the trustee. It is true that in that case the motion was made against the trustee under a deed of arrangement, who had paid over the money to the solicitor, and not, as here, against the solicitor himself; but that can make no difference in principle.

Then as to the other point. It is sought to set off the money due to the appellant for services rendered to the bankrupt before the act of bankruptcy against the money claimed by the trustee. But, according to the case of the appellant himself, the money was deposited for a particular purpose—that is, in respect of services to be rendered in the future—and the appellant now seeks to apply it to past services, that is, to apply it for a purpose other than that for which it was deposited, or, in other words, to misapply it. The attempt to use the money deposited as security for another purpose than that for which it was deposited is an attempt to do wrong. The judgment in *Turner* v. *Thomas* (4) is an authority against the appellant's contention on this point. It is true that if there were no bankruptcy, but all parties were sui juris, if the debtor, Pollitt, had brought an action against the appellant to recover the 15*l.*, the appellant could have set off the 40*l.* due to him for past services; but in the present case the appellant fails as to his second point, first, because he is attempting to create a security by doing what is

(1) 15 Q. B. D. 616.
(2) 24 Q. B. D. at pp. 734, 735.
(3) 58 L. T. (N.S.) 114; 4 Morrell Bank. Cas. 292.
(4) Law Rep. 6 C. P. 610.

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wrong, and, secondly, on the ground that the parties are not the same, and the dealings are not mutual; for in order to give effect to the appellant's contention it would be necessary to treat the debtor as if he were placed in a twofold capacity.

For the reasons which I have given, I have come to the conclusion that this appeal ought to be dismissed with costs.

WRIGHT, J. I am of the same opinion. The 15*l.* which was deposited remained the bankrupt's property in the hands of his solicitor, and if no work had been done it would have come back to him if there had been no bankruptcy. Therefore, so far as no work was done, it vested in the trustee. Then the question is raised, whether, in consequence of certain work having been done to which the money deposited would be applicable, the transaction comes within s. 49 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and is protected. It is argued for the appellant that the present case is governed by *In re Sinclair, Ex parte Payne* (1); but I agree with Vaughan Williams, J., for the reasons which he has given, that the two cases are distinguishable, and that the principle of that decision ought not to be extended.

As to the other point, with regard to set-off, I have felt more difficulty, but I agree as to that point also. I cannot see how there can be said to have been any mutual dealings, so that an account can be taken of what is due from one party to the other, according to the provisions of s. 38 of the Bankruptcy Act, 1883.

Appeal dismissed. Leave to appeal given.

Solicitors for appellant: *Nicholson & Crouch, for Minor, Manchester.*

Solicitor for respondent: *The Solicitor to the Board of Trade.*

(1) 15 Q. B. D. 616.

P. B. H.

IN RE VANSITTART. EX PARTE BROWN. 1892 Oct. 26, 27.

Bankruptcy—Gift of Jewels by Husband to Wife—"Settlement"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47: "(1.) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy."

"(3.) 'Settlement' shall, for the purposes of this section, include any conveyance or transfer of property."

Upon an application under the above section to avoid a gift of valuable jewellery by the bankrupt, it appeared that such jewellery had been given by him as a present to his wife within two years of his bankruptcy. There was no transfer in writing:—

Held, that to bring a transfer of personal property within the section it must be manifest from the nature and circumstances of the case that it was the object of the transferor that the subject-matter of the transfer should permanently remain the property of the transferee; that it must be taken that the bankrupt contemplated the retention by his wife of the present which he had given her; and that the gift was void against the trustee in the bankruptcy.

THIS was an application by the trustee in bankruptcy for a declaration that all the jewellery and shares in a company given by the bankrupt to his wife between December 8, 1889, and December 8, 1891, and pawn-tickets representing part of such jewellery, were the property of the trustee in bankruptcy.

It appeared that the debtor and his wife were married on February 24, 1881. There was no settlement. Between December 8, 1889, and December 8, 1891, the bankrupt presented his wife with certain valuable jewellery. He also, in November, 1890, transferred some shares in the Bengal Trust Company to his wife. The occasions selected for making the presents were Christmas Day, the anniversary of their wedding-day in 1891, and another occasion when the horse of the bankrupt won a race. Subsequently the bankrupt pawned part of the jewels for 80*l.*, and afterwards, being pressed by a bankruptcy notice, he handed over some more to Messrs. Hirsch for a temporary loan.

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On December 8, 1891, a receiving order was made against the bankrupt on a creditor's petition, and on January 9, 1892, he was adjudicated bankrupt.

Witt, Q.C., and *R. A. Germaine*, for the trustee. On the evidence there was no gift at all to the wife. It was a mere contrivance to keep the jewels from the creditors. But assuming that there was a gift, it was a voluntary settlement—that is, a transfer of property within the meaning of s. 47 of the Bankruptcy Act, 1883. (1)

Yate Lee, for the wife of the bankrupt. The section was never intended to apply to a case like the present one. If it does, every gift by a husband to his wife within ten years of his bankruptcy is liable to be set aside. The section must be taken to refer to a settlement in the ordinary sense of the word—that is to say, a disposition of property to be held for the enjoyment of some other person. It must be shewn that the interest of the settlor in such property passed to the trustee of the settlement upon the execution of the instrument: *In re Player*. (2)

Witt, Q.C., in reply.

Cur. adv. vult.

Oct. 27. The following written judgment was delivered by

VAUGHAN WILLIAMS, J. It is extremely difficult to extract from the decided cases any clear definition of the transfers of property which will and which will not fall within the operation of this section. The section, as Cave, J., points out in *In re Player* (2), has a history. The word "settlement" did not appear in the original statute, 1 Jac. 1, c. 15, s. 5. The words there were, "shall convey or procure or cause to be conveyed to any of his

(1) Sect. 47 of the Bankruptcy Act, 1883, enacts that:—

"(1.) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy."

"(3.) 'Settlement' shall, for the purposes of this section, include any conveyance or transfer of property."

(2) 15 Q. B. D. 682.

children or other person any lands, goods, chattels, or transfer his debts into other men's names, it shall be in the power of the commissioners to dispose thereof as if the bankrupt had been actually possessed thereof." Lord Ellenborough held, in *Kensington* v. *Chantler* (1), that money did not fall within the section, which was confined to things which were the subject of conveyance and capable of being conveyed or procured to be conveyed. Lord Ellenborough did not mean by this that the section only extended to land and did not extend to personal property; he meant apparently that the section did not apply to a gift of money which if given directly to the "donee" could not have been intended to be preserved, and seems to have mentioned the fact that money was not included in the words of the statute rather as an illustration that the statute was not intended to apply to gifts of personal property not intended to be preserved by the "donee" than as a definition of the subject-matter of the section. Indeed, in the very case of *Kensington* v. *Chantler* (1), a portion of the property, the transfer of which was held not to be within the section, was flats or boats given by the bankrupt to his son for the purpose of a salt-works business carried on by the son, which flats were still in the possession of the bankrupt down to the date of his father's bankruptcy. I infer from this and other decisions referred to in the text-books that the judges so read the section as to make the application of it depend on the intention of the "donor," at all events, to this extent, that the section did not apply to cases where the circumstances of the gift made it manifest that the subject-matter of the gift was not intended to be preserved by the "donee," as would be manifest in the case of a gift of money to a son to advance him in business, or to a son for his maintenance. The words of the original section so far as they affect the point under discussion remained unaltered until 1869, when for the first time the word "settlement" was introduced in the Bankruptcy statute and substituted for the words which I have cited. Perhaps the object of the change was, on the one hand, to indicate that the section was not intended to apply to transfers of property which, from the nature and circumstances of the transfer shewed that the "donor" did not contemplate the

(1) 2 M. & S. 36.

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preservation of the actual subject-matter of transfer by the transferee, and, on the other hand, to indicate that the section did apply to the transfer even of a sum of money when the intention was manifest that the money should be preserved either in its original form or in some other form of investment. It is difficult to account for the use of the word "settlement" in substitution for the words "transfer or conveyance" unless the legislature intended to indicate that the transaction to fall within the statute must manifest a contemplation by the "donor" of the permanency of the subject-matter of transfer as the property of the "transferee." This is what I understand Cave, J., to mean when he says the word to look at is "settlement" (1): "One must look at the whole of the language of the section in applying that definition, and consider what is meant by 'settlement.' Although 'settlement,' by the 3rd sub-section 'shall for the purpose of this section include any conveyance or transfer of property,' yet I think the view of my brother Mathew is well founded, and that a settlement in the ordinary sense of the word is intended. The transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer. The end and purpose of the thing must be a settlement—that is, a disposition of property to be held for the enjoyment of some other person." Taking this view, I am afraid that a present of diamonds by a man to his wife is a present which I ought to hold is a settlement on his wife. It seems to me that, to use the words of Cave, J., the purpose of the transaction was the preservation of the thing, whatever its form, for the enjoyment of another person. I think the "donor" contemplated the retention by his wife of the present which he gave her. I should have held just the same if he had given her money to buy herself a present. It will be observed that in the case of *In re Player* (1), where the transfer of the shares was held to fall within the section, the actual gift was of money to buy the shares.

I wish to add, that if I had to construe the section apart from previous decisions, I am not at all sure I should not have limited its operation to written transfers. I am not sure that this is not

(1) 15 Q. B. D. 682.

what Lord Ellenborough meant in *Kensington* v. *Chantler* (1); but it is quite impossible at this time to introduce such a limitation into the section, which up to the present time has never been introduced, at all events, expressly, in any of the judgments in any of the decided cases.

Therefore, the application of the trustee in bankruptcy must be allowed.

Solicitors for trustee: *K. & E. Bastard.*

Solicitors for respondent: *Sanderson, Holland & Co.*

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.

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Dec. 1.

DAVEY *v.* BENTINCK.

Practice—Order for Particulars—Terms on which Order can be made—Action to be dismissed unless Particulars given—Order XIX., *r.* 7.

By Order XIX., r. 7, "A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just."

Held, affirming an order of the Queen's Bench Division, that where a plaintiff is ordered to give particulars, one of the terms of the order may be that the action shall be dismissed unless the particulars are delivered within a certain time.

APPEAL from an order of the Divisional Court.

The action was brought for services performed and money paid by the plaintiff for the defendant at his request, and on an account stated; there was also a claim for damages for libel. An order for particulars was made by a master at the instance of the defendant. No particulars having been delivered, a further order was made by the master directing the plaintiff to deliver them in ten days; and at a later date another order, that the action should be dismissed with costs unless the plaintiff delivered his particulars within a week. Particulars were then delivered, and, as these were deemed insufficient, a summons was issued by the defendant that, notwithstanding the so-called particulars, the plaintiff should deliver further particulars; and an

(1) 2 M. & S. 36.

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order was made on July 20 for proper particulars, and that unless they were delivered in ten days, certain paragraphs in the statement of claim should be struck out. A second set of particulars were delivered on July 30, 1892. These were also deemed insufficient, as not disclosing what were the services rendered or the persons to whom the alleged libel (which was contained in a letter from the defendant to the plaintiff) was published. A summons was accordingly taken out on August 4 (i.) to strike out the statement of claim, under Order xxv., r. 4, on the ground that the claim was frivolous and vexatious, and an abuse of the process of the Court; (ii.) to dismiss the action with costs, unless the plaintiff within seven days should deliver proper particulars, pursuant to previous orders in that behalf. This summons was heard, and an order made on August 10 dismissing the action with costs.

An appeal to a judge at chambers was dismissed.

On appeal to a Divisional Court, an order was made on October 28 dismissing the action with costs unless the plaintiff should deliver his particulars within fifteen days.

The plaintiff did not deliver particulars within the specified time, but appealed on notice to set aside the order of the master of August 10, and the order of the judge affirming the same, and the order of the Divisional Court.

J. E. Fox, in support of the appeal. There is nothing on the face of the pleadings to shew that the action is frivolous or vexatious, and consequently there was no power under Order xxv., r. 4 (1), to order the action to be dismissed. It is submitted that the particulars furnished are sufficient, or at all events that the plaintiff has furnished such particulars as he is able, and that there is no power in such case to dismiss the action.

J. Eldon Bankes, for the defendant. The particulars delivered are merely illusory; they contain only a repetition of the state-

(1) Order xxv., r. 4: "The Court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shewn by the pleadings to be frivolous or vexatious, the Court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

ments in the claim, and shew that the publication of the alleged libel was only to the plaintiff himself. Under these circumstances there is a right to consider the particulars in determining whether the action is frivolous and vexatious. At any rate, the order of the master and that of the Divisional Court can be supported under Order XIX., r. 7, which gives authority to impose terms in an order for further and better particulars. (1)

J. E. Fox, in reply. The authority given by Order XIX., r. 7, to impose terms "as to costs and otherwise," applies only to matters incidental to the action, and not to the dismissal of the action.

LORD ESHER, M.R. In this case an order was made by a master dismissing the action, and this has been affirmed by a judge. The Divisional Court, on appeal, ordered that the action should be dismissed unless the particulars were delivered within fifteen days.

The summons on which the order of the master was made states two grounds: first, that the action is frivolous and vexatious, and should on that ground be struck out; and, secondly, that orders previously made for particulars to be given in a certain time had not been complied with. The effective part of the order is that the action should be dismissed; and it seems to me that if either of the matters stated in the summons was made out the order of the master was justified, and I have come to the conclusion that under the circumstances of this case the master not only had jurisdiction to make the order, but that he rightly exercised it.

As to the question whether an order dismissing the action as frivolous and vexatious is right, such an order might be supported on either of two grounds—that is, either directly under Order XXV., r. 4, or under the inherent jurisdiction of the Court to prevent oppression. Whether the case can be brought within Order XXV., r. 4, depends on whether for that purpose such

(1) Order XIX., r. 7: "A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered upon such terms, as to costs and otherwise, as may be just."

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particulars as have been ordered in this case can be considered as part of the pleadings. I incline to that opinion, and to the view that the rule should be construed in its largest sense, so that where particulars shew that the grounds on which a party is either bringing or defending an action are frivolous or vexatious that is sufficient to warrant an order to dismiss the action or strike out the defence, as the case may be. It is not necessary finally to decide this point, because I have no doubt that the Court at any stage of the proceedings, if it appears that the action is frivolous or vexatious or that the defence is so, has by its inherent jurisdiction power to stop the proceedings or to strike out the defence. If so, there is no question in my mind on the facts of this case that the action was oppressive. The plaintiff has been asked for particulars of the services rendered, and all he has done is to repeat the statement that services were rendered, without giving any further particulars as to what they were; and as to the libel he says he is not in a position to give particulars of the persons to whom it was published. The conclusion is irresistible that there were no such services and no such publication, and without these there is no cause of action and the action is frivolous and vexatious and oppressive.

The other ground on which the order may be supported is that Order XIX., rr. 6, 7, give to the Court power in certain cases to order particulars and to impose terms, and that this includes the power to add as a consequence that if the order is not complied with in a certain time the action shall be dismissed.

The orders appealed against can be supported on either of these grounds, and the appeal must be dismissed.

LOPES, L.J. There are three grounds on which it is said the orders of the master, the judge, and the Divisional Court can be supported. Either as coming under Order XXV., r. 4, or under the inherent jurisdiction of the Court, or as authorized by Order XIX., rr. 6, 7. It is not necessary to decide whether Order XXV., r. 4, applies, and whether within the meaning of that rule particulars are part of the pleadings, though I am inclined to think that that is so; but I am clear that the order may be

supported either under the inherent jurisdiction of the Court to put an end to oppressive proceedings, or under the power given by Order XIX., rr. 6, 7, to attach a condition or term to come into force on non-compliance with an order for particulars. In this case that term was properly imposed, and the order to dismiss the action was justified.

Appeal dismissed.

Solicitors for plaintiff: *Fox & Joy.*
Solicitors for defendant: *Lewis & Lewis.*

A. M.

[IN THE COURT OF APPEAL.]

JAY *v.* JOHNSTONE.

Limitations, Statute of—"*Judgment*"—3 & 4 *Wm.* 4, *c.* 27, *s.* 40—3 & 4 *Wm.* 4, *c.* 42, *s.* 3—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Order* XVII., *r.* 4.

By s. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57): "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same":—

Held, affirming the decision of the Queen's Bench Division, that the expression "judgment" in s. 8 of the Real Property Limitation Act, 1874, refers to judgments generally, and is not restricted to judgments which operate as charges upon land.

Watson v. *Birch* (15 Sim. 523) followed.

APPEAL from a decision of a Divisional Court (Lord Coleridge, C.J., and Wills, J.) (1), holding that the remedy upon a judgment recovered by the plaintiff in an action of covenant was barred by the lapse of twelve years. The personal representatives of the plaintiff appealed.

Witt, Q.C., and *Montague Lush*, for the appellants, pursued the same line of argument as in the Divisional Court. [They referred to the statutes 3 & 4 Wm. 4, c. 27, s. 40; 3 & 4 Wm. 4, c. 42, s. 3; 1 & 2 Vict. c. 110, ss. 1, 2, 3, 5; 27 & 28 Vict. c. 112, s. 1;

(1) Ante, p. 25.

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37 & 38 Vict. c. 57, s. 8, and cited the following authorities: *White* v. *Parnther* (1); *Willaume* v. *Gorges* (2); *O'Kelly* v. *Bodkin* (3); *Hunter* v. *Nockolds* (4); *Sheppard* v. *Duke* (5); *Watson* v. *Birch* (6); *Sutton* v. *Sutton* (7); *Allison* v. *Frisby* (8); *Hebblethwaite* v. *Peever.* (9)]

Finlay, Q.C., and *H. T. Eve*, for the respondent, were not called upon.

LINDLEY, L.J. The question raised by this appeal is a very important one—namely, whether proceedings can be taken to enforce a judgment after twelve years, there having been no payment or acknowledgment in the meantime. Undoubtedly some difficulty has been occasioned by the course which the legislature has taken in dealing with the subject. In the year 1833, Parliament, for some reason or other, passed two separate Acts relating to limitations, one, the 3 & 4 Wm. 4, c. 27, which relates to actions for the recovery of land, and also to actions for the recovery of money in certain cases; and the other, the 3 & 4 Wm. 4, c. 42, relating to debts by specialty, and certain other debts. Why the two statutes were not blended in one I cannot understand; nor was it material, because the period of limitation under both Acts was the same—namely, twenty years. While that was the state of the law, the question arose before Shadwell, V.C., in *Watson* v. *Birch* (6), as to which of the two Acts governed judgments. Judgments are specially mentioned in 3 & 4 Wm. 4, c. 27, and not in the other Act; although, being specialties, they might be, and primâ facie would be, included in that Act. But the Vice-Chancellor decided that, upon the true construction of the two statutes, judgments were governed by 3 & 4 Wm. 4, c. 27, and that a judgment could not be enforced even as against the personal estate of a judgment debtor after twenty years. That decision has been accepted and acted upon by everybody without question ever since; and the law, as settled by that authority and by other decisions that followed it, was

(1) 1 Knapp, 179.
(2) 1 Camp. 217.
(3) 3 Ir. Eq. 390.
(4) 1 Mac. & G. 640.
(5) 9 Sim. 567.
(6) 15 Sim. 523.
(7) 22 Ch. D. 511.
(8) 43 Ch. D. 106.
(9) [1892] 1 Q. B. 124.

shortly to this effect—that under that Act a judgment was barred after twenty years. It is true that, at the date of that Act, in 1833, and long afterwards, judgments were charges on real estate and payable out of real estate; and it is also true that by reason of a change in the law relating to the registration of judgments a modification was introduced. In 1864, the law relating to the registration of judgments, which is well known to have been extremely intricate and troublesome, was simplified by 27 & 28 Vict. c. 112, and a judgment ceased per se to be a charge on land. Instead of that, the writ of elegit was registered, and then, and not before, was there any charge on the land in respect of the judgment debt. The effect of this was to render it unnecessary for purchasers of land to search for judgments; all that they had to do was to search for writs. But it would be straining that Act, which was passed for the sole purpose of improving the law relating to registration, too much to construe it so as to effect a totally different purpose—namely, to alter the time within which a judgment can be enforced. In my opinion, notwithstanding the alteration made in the registration of judgments by the Act of 1864, the true construction of the Act of 3 & 4 Wm. 4, c. 27, is in no way altered. There is no reported case in which the Act of 1864 has been held to have this effect.

We now come to the Act of 1874 (37 & 38 Vict. c. 57), the Act now in force relating to the time of enforcing judgments. The key to that Act is to be found, not in s. 8, but in the preamble and s. 9. The preamble says: "Whereas it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent and of charges thereon"; and then s. 9 provides in effect that the Act should be read with 3 & 4 Wm. 4, c. 27. That section is as follows: "From and after the commencement of this Act all the provisions of the 3 & 4 Wm. 4, c. 27, except those contained in the several sections thereof next hereinafter mentioned, shall remain in full force, and shall be construed together with this Act, and shall take effect as if the provisions hereinbefore contained were substituted in such Act for the provisions contained in the sections thereof numbered 2, 5, 16, 17, 23, 28, and 40

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respectively (which several sections from and after the commencement of this Act shall be repealed), and as if the term of six years had been mentioned instead of the term of ten years in the section of the said Act numbered 18, and the period of twelve years had been mentioned in the said section 18 instead of the period of twenty years." It was clearly the purpose of this Act to substitute twelve years for twenty years in the sections of the previous Act, referred to in s. 9. The object was not to change the meaning of the language used in the earlier Act, but in other respects to preserve it. Sect. 8, which more immediately applies to the present case, simply repeats the language of s. 40 of the earlier Act. [The Lord Justice read s. 8. (1)] There is not a single indication of any intention to alter the meaning of the words of the section in the earlier Act, or to give them any new meaning, but only to substitute twelve years for twenty years. It was ingeniously argued by the appellants' counsel that the effect of the Act of 1864 (27 & 28 Vict. c. 112), was that judgments ceased to be a charge on the land, and, therefore, were untouched by the present Real Property Limitation Act. I do not agree with that view. It is true that judgments have ceased in one sense to be a charge on the land; but I think that Wills, J., was right in his view of the Act of 1864, and that it was not intended to have any such effect. To adopt the argument of the appellants, would be to produce an effect not dreamt of by any one, and to reverse the decisions of forty years. I am of opinion hat the decision appealed from was right, and the appeal must be dismissed.

BOWEN, L.J. I am of the same opinion.

Appeal dismissed.

Solicitor for appellants: *H. J. Comyns.*

Solicitors for respondent: *Eardley-Holt, Hulbert, & Hubbard.*

M. W.

(1) See ante, p. 26, n.

[IN THE COURT OF APPEAL.]

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1892
Dec. 13, 17.

PERKINS *v.* BELL.

Sale of Goods—Sale by Sample—Acceptance—Inspection at place of Delivery—Right of Purchaser to reject.

The plaintiff sold barley to the defendant by sample, to be delivered at T. railway station, which was near the plaintiff's farm. On the same day the defendant re-sold the barley to a brewer. Afterwards the plaintiff discovered that his servants had by mistake mixed some inferior barley with the barley sold to the defendant, and gave the defendant notice of the mistake, offering to make good any deficiency of quality. He duly delivered the barley at T. Station, and while it was there the station-master, at the defendant's request, took a bulk sample of the barley and sent it to the defendant. The defendant having received the bulk sample, directed the station-master to send on the barley to the brewer who had purchased it; but he rejected it as not being according to the sample. The defendant then himself claimed to be entitled to reject the barley:—

Held, that there was nothing in the contract or the circumstances to rebut the presumption that the place of delivery was to be the place of inspection; and that as the defendant had inspected a sample at such place of delivery, and ordered the barley to be sent on to the sub-purchaser, he must be considered to have accepted the barley, and could not afterwards reject it.

Appeal from a judgment of Lawrance, J., dismissing the plaintiff's action for goods sold and delivered.

At the trial before Lawrance, J., at the Leicester Assizes, it appeared that on October 4, 1890, the plaintiff, who was a farmer, sold to the defendant, who was a corn-dealer, at his stand in Leicester Market, by sample, thirty-one quarters of malting barley at 34*s.* a quarter, to be delivered in sacks at Theddingworth Station, which is a roadside railway station about two-and-a-half miles from the plaintiff's farm.

At the time of the sale the plaintiff was aware that the defendant would re-sell the barley, and probably to brewers or maltsters; but the plaintiff had no knowledge when or to whom such re-sales would take place, nor to where the defendant would consign the barley. The defendant on the same day re-sold the barley by the same sample to Messrs. Sharpe & Co., brewers and maltsters, at Sileby, at an advance of 2*s.* per quarter. On October 7 the plaintiff sold to the defendant in Market

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Harborough Market three more quarters of barley of not such good quality as the first, and it was arranged that the plaintiff should send to the defendant a sample of this barley, the price to be thereafter agreed upon. This barley was also to be delivered by the plaintiff in sacks at Theddingworth Station. Upon the plaintiff arriving home at his farm in the evening, he found that his men whilst winnowing the three quarters had, against his orders, mixed them with the thirty-one quarters, and he at once wrote to the defendant informing him of what had been done, and adding that if the defendant complained that it made any difference to him in the sample, he (the plaintiff) would make it good, but he hoped that it would not. Upon receipt of this letter, the defendant, on October 8, wrote to the station-master at Theddingworth Station to forward him a sample of the "about thirty-five quarters of barley, ex A. K. Perkins." This the station-master did, taking the sample out of twenty of the thirty-four quarters which had then arrived at his station. The residue arrived there the next day. It is admitted that the station-master took a fair sample of the barley. Having inspected this sample, the defendant on October 9 ordered the station-master to forward the thirty-four quarters (called forty) to the order of Messrs. Sharpe & Sons, maltsters, at Sileby, stating that the cost of carriage was to be placed to his account. On October 10 the barley was sent off. On October 16, Messrs. Sharpe, by telegraph to the defendant, rejected the barley, which was then at Sileby, and he thereupon wrote to them as follows: "16th October, 1890. Your telegram to hand. I can only say we had a bulk sample from sending station before moving on and considered it a fair delivery; however will bring you large bulk sample on Saturday to Leicester Market, and oblige; the barley left sending station on the 10th instant, according to my back rate. Yours truly, W. Bell, Jun." On the same day, before the receipt of the above-mentioned letter, Messrs. Sharpe wrote to the defendant stating: "It seems strange that you did not take a bulk sample of it yourself before ordering on to Sileby, and thus save carriage. We feel sure if you had done so as promised you would not have sent it, as it is quite unfit for

brewing of ale." The barley was subsequently rejected by the defendant, and the plaintiff accordingly brought the present action.

The learned judge gave judgment for the defendant, being of opinion that the defendant had never accepted the barley, and the plaintiff appealed from that judgment.

A. J. Toller, for the plaintiff. The defendant had no right to reject the barley; he had accepted it and taken possession of it. It may be admitted that he had a right to inspect the barley before accepting it. But he had exercised that right, for he had received a bulk sample from the station-master at Theddingworth, and was satisfied with it, and accordingly ordered the barley to be sent on to Sileby. He could not have done anything shewing more clearly his acceptance of the barley. The defendant may be entitled to bring an action for damages against the plaintiff on the ground that the bulk was inferior to the sample, but he cannot now repudiate the purchase: *Parker* v. *Palmer* (1); *Heilbutt* v. *Hickson* (2); *Poulton* v. *Lattimore*. (3)

Loyd, Q.C., for the defendant. The defendant never accepted the barley. He had no opportunity of inspecting the bulk. The plaintiff knew that the defendant was a dealer and did not buy the barley for his own use, but would re-sell it, and it was therefore understood as a term of the contract that the inspection would be at some place where it could be conveniently done, which would not be at the place of delivery. Theddingworth Station was named as the place of delivery because it was near the plaintiff's farm; but it was not a suitable place for inspection. It is a small station without the conveniences for such a purpose. The defendant only took bulk samples there to see if it was worth while to send the barley on to the warehouse of the sub-purchaser, where the inspection would necessarily be; and he exercised no act of ownership by ordering it to be sent on to Sileby. He did not communicate to the plaintiff what he had done, nor in any way indicate his acceptance of the goods. The property never passed to him, and the plaintiff cannot maintain

(1) 4 B. & A. 387. (2) Law Rep. 7 C. P. 438.
(3) 9 B. & C. 259.

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this action: *Morton* v. *Tibbett* (1); *Page* v. *Morgan* (2); *Jenner* v. *Smith* (3); *Grimoldby* v. *Wells.* (4)

A. J. Toller, in reply. It was never intended that the inspection should be by the ultimate purchaser, to whom the barley might have been sold some weeks after the original contract. Such a provision would require to be expressed in words.

Cur. adv. vult.

1892. Dec. 17. A. L. SMITH, L.J., delivered the judgment of the Court (Lindley, Bowen, and A. L. Smith, L.JJ.). After stating the facts as set forth above, the Lord Justice proceeded:—The sole point the parties raise is whether upon the contract between them, and the facts of this case, the defendant was in time in rejecting the barley as and when he did. My brother Lawrance held that he was; and hence the present appeal. It will be noticed that by the contract the plaintiff was to deliver the barley at Theddingworth Station. No other destination was known to him, and we cannot doubt that if this had been a sale of specific ascertained barley, the property therein would have passed to the defendant upon its delivery to the railway company at the station by the plaintiff. The railway company would thereupon have become the agents of the defendant to receive it and to carry it to any place or places the defendant might direct. But it was said by Mr. Loyd for the defendant that inasmuch as this was a sale by sample, the defendant was entitled to a fair opportunity of comparing the bulk with the sale sample after delivery, before the property in the barley passed to him, and that the place for inspection need not necessarily be the place at which delivery is to be made; and in this we agree. The question, however, is if there can be read into this contract an implied term that the inspection was to be had at any place fixed by the vendee without the knowledge of the vendor. This is not a case in which before a sale by sample it is agreed that the destination of the goods shall be the vendee's premises or some other named locality, and that the transit thereto shall be performed partly by the vendor and partly by

(1) 15 Q. B. 428.
(2) 15 Q. B. D. 228.
(3) Law Rep. 4 C. P. 270.
(4) Law Rep. 10 C. P. 391.

the vendee. In such a case it would be right to imply that the place of destination agreed upon was the place for inspection, and that the joint transit was only an agreed mode of getting the goods there: see *Grimoldby* v. *Wells* (1). This is a case in which at the time of sale the only known destination was Theddingworth Station, at which the vendor undertook to deliver the barley at his own risk and expense. Of all that should take place afterwards as regards the barley, the vendor knew nothing. It was entirely at the disposal of the vendee, who might send it where and to whom he pleased, and when he pleased, and over which disposition the seller could exercise no control. We find no evidence in this case to dislodge the presumption which primâ facie arises, that the place of delivery is the place for inspection. To hold otherwise would be to expose the vendor to unknown risks, impossible of calculation, when the contract was entered into. The vendee might consign the barley not only to one, but to different sub-vendees, living in different places and at different distances from Theddingworth Station, and until arrival at these places the barley would be at the risk of the vendor. If the barley was rejected by these sub-vendees upon arrival, the vendor would have at his own risk and cost to take the barley back from whatever places it might happen to be in, no matter how far they might be from Theddingworth Station, or to arrange for its sale at the places where it then was. As to these risks the contract is wholly silent, and in our judgment it is impossible to read into it that the vendor undertook these risks, as we were invited by Mr. Loyd to do. It was argued that Theddingworth Station was a mere roadside station, and that there was no opportunity there of comparing the bulk with the sample, and that consequently the station was not the place for inspection and that some other place was, and that this was the warehouse of the maltsters or brewers to whom the defendant might have chanced to have sent the barley. The evidence given shews that the bulk could be inspected in the sacks in the trucks at the station. The suggestion that the barley had to be shot before inspection is untenable, and there is no evidence to support it. Moreover, the letters of October 16 shew that

(1) Law Rep. 10 C. P. 391.

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neither the defendant nor Messrs. Sharpe considered that there was any difficulty whatever in taking a bulk sample at the station—the one saying that he had had one taken, and the other saying that he should have done so, as promised. It seems to us that even if the plaintiff's country solicitors did take a wrong view of their client's position under the contract, as suggested by Mr. Loyd, this cannot affect its construction; and as there is nothing in the contract itself, nor any evidence, to shew that by usage of trade as applied to such a contract or otherwise the primâ facie place for inspection had been altered, in our judgment, under the contract the place of delivery named was the place where the inspection was to be had, and consequently Theddingworth Station was the place where rejection should have taken place and not the premises of the maltsters at Sileby. When the defendant took possession of the barley at the station and ordered it to his sub-vendees, the property in the barley passed to him, and his right of rejection was then gone. For these reasons we think the plaintiff is entitled to judgment. Lawrance, J., does not appear to have had his mind sufficiently directed to the real nature of the contract between the parties. The appeal must be allowed with costs here and below, and judgment entered for the plaintiff.

Appeal allowed.

Solicitors for appellant: *Crowders & Vizard, for Douglas, Market Harborough.*

Solicitors for respondent: *Warren, Gardner, & Murton, for Lamb & Stringer, Kettering.*

M. W.

[IN THE COURT OF APPEAL.]

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1892

Oct. 28; *Dec.* 3.

IN RE BINSTEAD. EX PARTE DALE.

Bankruptcy—Bankruptcy Notice—"Final Judgment"—Decree for Dissolution of Marriage—Order for Payment of Costs by co-Respondent—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-ss.* 1 (*e*), 1 (*g*).

In a suit by a husband against his wife for dissolution of the marriage on the ground of her adultery, a decree nisi for dissolution was made, the decree containing an order for the payment of the petitioner's costs by the co-respondent. The decree was afterwards made absolute; the costs were taxed at 204*l.*, and an order was made that the co-respondent should pay the amount within a specified time. He failed to comply with the order:—

Held, that there had not, within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, been a "final judgment" for the amount, and that the petitioner could not issue a bankruptcy notice against the co-respondent in respect of it.

APPEAL by E. J. Dale against an order of the registrar dismissing a bankruptcy petition which the appellant had presented against A. M. Binstead.

Binstead was co-respondent to a suit for a divorce which Dale instituted against his wife, on the ground of her alleged adultery. At the trial, on April 26, 1888, the jury found that the wife had committed adultery with the co-respondent. A decree nisi was pronounced, by which the judge decreed that the marriage should be dissolved, by reason that since the celebration thereof the wife had been guilty of adultery with Binstead, unless sufficient cause should be shewn to the Court why the decree should not be made absolute within six months from the making thereof; and the judge condemned the co-respondent in the costs incurred and to be incurred on behalf of the petitioner in the cause. On November 13, 1888, the decree was made absolute, no cause having been shewn, and the marriage was declared to be dissolved. The costs were afterwards taxed at 204*l.* 19*s.* 8*d.*, and an order was made that they should be paid by Binstead within a specified time. He did not pay them within that time, and on July 26, 1892, Dale issued a bankruptcy notice against him in respect of the amount, treating the decree absolute of the Divorce Court as a final judgment. Binstead

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did not comply with the notice within the time limited for the purpose, and the bankruptcy petition was founded upon the non-compliance, which was alleged to be an act of bankruptcy. The registrar dismissed the petition, on the ground that there had not been any act of bankruptcy, the order not being a "final judgment" in an action. Dale appealed.

Herbert Reed, Q.C., and *J. Eldon Bankes*, for the appellant. The order for the payment of the costs, at any rate when taken in conjunction with the order for payment of the taxed amount, is a "final judgment" for that amount within the meaning of sub-s. 1 (*g*) (1) of s. 4 of the Bankruptcy Act, 1883. Therefore the bankruptcy notice was properly issued, and the failure to comply with it constituted an act of bankruptcy. A receiving order ought to have been made: *Ex parte Moore* (2); *In re Riddell.* (3)

[LOPES, L.J., referred to *Salaman* v. *Warner.* (4)

KAY, L.J., referred to *In re Alexander.* (5)]

It is not necessary that there should have been a judgment in an "action," strictly so called. The definition of "action" in s. 100 of the Judicature Act, 1873—"a civil proceeding commenced by writ, or in such other manner as may be prescribed

(1) By s. 4 "(1.) A debtor commits an act of bankruptcy in each of the following cases (inter alia):—

"(*e*) If execution issued against him has been levied by seizure and sale of his goods under process in an action in any Court, or in any civil proceeding in the High Court."

"(*g*) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

(2) 14 Q. B. D. 627.

(3) 20 Q. B. D. 512.

(4) [1891] 1 Q. B. 734.

(5) [1892] 1 Q. B. 216.

by Rules of Court"—includes a proceeding in the Divorce Division for dissolution of marriage, and by s. 100 "judgment" includes "decree."

[LORD ESHER, M.R. Could a counter-claim be set up "in the action in which the judgment was obtained"? Is there such a thing as a counter-claim in the Divorce Division?]

E. Clayton, for Binstead. In *In re Riddell* (1), Lord Esher, M.R., said (at p. 516) that "a final judgment" in sub-s. 1 (*g*), "means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined in favour either of the plaintiff or the defendant." In the present case there was no "pre-existing right" of the petitioner against the co-respondent, and the proceeding was not an "action." It may be admitted that the order for the payment of the costs was "final," but it was not a "judgment": *Ex parte Chinery*. (2) The right to enforce an order by execution does not make the order a "judgment." Sect. 4, which establishes "acts of bankruptcy," is a quasi penal one, and it must be construed strictly. In sub-s. 1 (*e*) of s. 4, a "civil proceeding" is spoken of in contradistinction from an "action." There are no corresponding words in sub-s. 1 (*g*), and this tends to shew that in that sub-section the word "action" must be very strictly construed. The definitions given in s. 100 of the Judicature Act, 1873, apply to the construction of that Act, not to the construction of the Bankruptcy Act. A proceeding in the Divorce Court is commenced under the Rules of that Court; not under the Rules of Court made under the Judicature Act. For the purposes of the Judicature Act garnishee proceedings would come within the definition of an "action" in that Act; and yet in *Ex parte Chinery* (2) it was held that garnishee proceedings were not an "action" for the purposes of the Bankruptcy Act. A proceeding for a divorce is a statutory proceeding, just as a garnishee order is. The strictness with which sub-s. 1 (*g*) has always been construed is further illustrated by *Ex parte Schmitz* (3); *Ex parte Whinney* (4); *In re Riddell* (1); *In re*

(1) 20 Q. B. D. 512.
(2) 12 Q. B. D. 342.
(3) 12 Q. B. D. 509.
(4) 13 Q. B. D. 476.

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Henderson (1); *In re Crump.* (2) In *Ex parte Moore* (3), the order for payment of costs formed part of a "final judgment" in an action in the Chancery Division. The procedure of the Court of Chancery was altered by the Judicature Rules, whereas that of the Divorce Court was not.

J. Eldon Bankes, in reply. The definition of action given in s. 100 of the Judicature Act is not a conclusive test whether a proceeding is an action within sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act. An action in a county court would be within sub-s. 1 (*g*), though it would not come within the definition given in s. 100 of the Judicature Act. Any order which can properly be called a "final judgment" is sufficient for the purposes of sub-s. 1 (*g*). In sub-s. 1 (*e*) of s. 4, the words "civil proceeding" are used as opposed to "criminal proceeding," not to "action." There is nothing in sub-s. 1 (*g*) to shew that the "final judgment" which is required to found a bankruptcy notice must be a judgment in an "action" as defined in the Judicature Act.

Cur. adv. vult.

Dec. 3. LORD ESHER, M.R. By the decree nisi made in a suit in the Divorce Court, instituted by the appellant Dale against his wife for the dissolution of the marriage, on the ground of her adultery with the co-respondent Binstead, it was decreed that the marriage should be dissolved, unless cause should be shewn within six months why the decree should not be made absolute, and the judge condemned the co-respondent in the costs of the petitioner in the cause. The decree was afterwards made absolute, and the petitioner's costs were taxed at 204*l.* 19*s.* 8*d.* The petitioner served a bankruptcy notice on the co-respondent, treating the order for payment of the costs as a final judgment against him within the meaning of the Bankruptcy Act. The costs were not paid, and the petitioner presented a bankruptcy petition against the co-respondent, alleging the failure to comply with the bankruptcy notice as an act of bankruptcy. The registrar was of opinion that the order for payment of

(1) 20 Q. B. D. 509. (2) 8 Morrell, 174.
(3) 14 Q. B. D. 627.

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the costs was not a "final judgment" within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, and that, therefore, the bankruptcy notice was invalid, and no act of bankruptcy had been committed, and he accordingly dismissed the bankruptcy petition. From this dismissal the petitioner has appealed.

We have, therefore, to construe s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, a section under which (if it applies) a man may be compelled to commit an act of bankruptcy in respect of which he may be made a bankrupt, and thereby not only will he be forced to pay the particular debt in respect of which the bankruptcy notice was issued, but all his other creditors will be brought into the bankruptcy. The bankruptcy is not merely an execution of the order or decree on which it is based, but it has a great effect on the debtor's other creditors, compelling them, as a general rule, to accept payment, not of the whole of their debts, but of a part only. Therefore, sub-s. 1 (*g*) of s. 4 operates not only against the debtor himself, but also against other persons.

The question for us to determine is, whether an order for the payment of costs, forming part of a decree of the Divorce Court, is a "final judgment" within sub-s. 1 (*g*). It has been held by this Court that that sub-section must be strictly construed. In *Ex parte Chinery* (1), Cotton, L.J., said (at p. 345): "Now, in legal language, and in Acts of Parliament, as well as with regard to the rights of the parties, there is a well-known distinction between a 'judgment' and an 'order.' No doubt the Orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment, but still judgments and orders are kept entirely distinct. It is not said that the word 'judgment' shall in other Acts of Parliament include an 'order.' I think we ought to give to the words 'final judgment' in this sub-section their strict and proper meaning, i.e., a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established . . . ." That shews that the words "final judgment" ought to be construed strictly. If we so construe them, can they apply to an order for the payment of costs made by the Divorce Court in the decree in a divorce suit? The words of the sub-

(1) 12 Q. B. D. 342.

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section are: "If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed"—"execution," it does not say enforcement—"has served on him . . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not . . . . either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained." That seems to shew that, if you construe the words "final judgment" strictly, they must mean a judgment in an action in which the defendant might have a counter-claim, or set-off, or cross-demand which could be set up in the action in which the judgment was obtained. Is it possible to say that a suit in the Divorce Court is a proceeding in which a party could (if the facts raised it) have a counter-claim, set-off, or cross-demand? It is impossible to say so, and that goes far to shew that an order of the Divorce Court is not a "final judgment" within sub-s. 1 (*g*).

This view is confirmed by the Form No. 6 of a Bankruptcy Notice given in the Appendix to the Bankruptcy Rules, 1886. The whole of this legislation, as it seems to me, if it is construed strictly, or, I might even say, naturally, is obviously not applicable to an order for costs made by the Divorce Court.

It was urged that sub-s. 1 (*e*) of s. 4 shews that such an order cannot be within sub-s. 1 (*g*). I am not sure whether you can strengthen sub-s. 1 (*g*) by means of sub-s. 1 (*e*). I am inclined to think that an order of the Divorce Court is not one on which execution could issue, but that the Divorce Court must enforce its order by its own procedure. It is, however, unnecessary to decide that point. Taking sub-s. 1 (*g*) alone, I think that the decision of the Registrar was right, and that this appeal must be dismissed.

LOPES, L.J. I am clearly of opinion that the decree of the Divorce Court was not a "final judgment" within the meaning

of sub-s. 1 (*g*). I cannot express my view in more appropriate words than those which were used by Cotton, L.J., in *Ex parte Chinery* (1), and which have been already quoted by the Master of the Rolls. The Lord Justice went on to say (at p. 345): "Undoubtedly a garnishee order absolute is a final order in the proceeding in which it is obtained; but is it a final judgment in the sense which I have mentioned? I think there is a good deal to be found in this sub-section which is against that view. It speaks of a 'final judgment' obtained by a creditor against his debtor. To my mind this points to a liability of the debtor to the creditor being established in an action, and not to a proceeding of this kind, which is not an action, but a statutory proceeding, for the purpose, not of establishing any liability of the garnishee to the person who obtains the order, but of attaching a debt due by the garnishee to the debtor whose liability to the judgment creditor had been established by the judgment in the action. The latter part of the sub-section, I think, confirms this view, and indeed everything in it, in my opinion, tends to shew that the words 'final judgment' are used in their strict technical sense. And when the legislature enacts that a particular act or default shall be an act of bankruptcy, I think we ought not to give to their words any but their strictly proper meaning, unless we are clearly satisfied that it was the intention of the legislature to use the words in a larger sense." Bowen, L.J., and Fry, L.J., gave judgment to the same effect, and these judgments go far to shew that this decree of the Divorce Court is not a "final judgment" within sub-s. 1 (*g*). I think also that sub-s. 1 (*e*) is most important. It contains the words "process in an action in any Court, or in any civil proceeding in the High Court." These are large and comprehensive words, and they lead me to think that the narrower words used in sub-s. 1 (*g*) were advisedly used by the legislature. It is unnecessary to decide whether sub-s. 1 (*e*) might have been used in this case for the purpose of obtaining an act of bankruptcy. I am inclined to think that it might, but I do desire not to express any concluded opinion on the point. I am satisfied that this decree is not a "final judgment" within sub-s. 1 (*g*).

(1) 12 Q. B. D. 342.

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KAY, L.J., read the following judgment. The appellant seeks to make Binstead a bankrupt. The alleged act of bankruptcy is the non-compliance within the prescribed time with the requirements of a bankruptcy notice under s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883. [The Lord Justice read sub-s. 1 (*g*), and continued:—] It has been decided that this sub-section does not mean that the person serving the notice must have been a creditor before the judgment. Obviously, such a construction would exclude judgments in actions of tort. It includes all cases in which the applicant becomes a creditor by the judgment. The meaning is that he must be a judgment creditor when he gives the notice: *Ex parte Moore.* (1) It is also settled that a judgment against a defendant for costs may be final, though other parts of the judgment direct accounts or inquiries the result of which may be to find money due to him: *Ex parte Moore* (2); *In re Alexander.* (3)

In the present case, if the decree had been a judgment in an action in the Chancery Division or in the Queen's Bench Division, it cannot be denied that it would be a good foundation for a bankruptcy notice. But it is a decree against a co-respondent in a proceeding for divorce ordering him to pay costs. This order was contained in the decree nisi, which has since been made absolute. The costs have been taxed, and an order to pay them within a time fixed has since been made, like the four day order which is familiar in Chancery practice.

The real objection is, that this is not a judgment in an action, to which alone, it is said, s. 4, sub-s. 1 (*g*), refers. Now, first of all, the word "action" only occurs in the latter part of the sub-section, which provides that the debtor may shew that he has not committed an act of bankruptcy by not complying with the notice, when he can satisfy the Court that the debt may be expunged by "a counter-claim, set-off, or cross-demand," of equal or greater amount, "which he could not set up in the action in which the judgment was obtained." That includes the case of an action in which for any reason, a counter-claim could not be made, as, for example, where the provisions as to counter-

(1) 14 Q. B. D. 627, 634. (2) 14 Q. B. D. 627.
(3) [1892] 1 Q. B. 216.

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claim do not apply to the particular Court in which the judgment was obtained. If there is no such proceeding in the Divorce Court, that circumstance does not seem to me to prevent the sub-section from applying. The objection appears to me to be highly technical. The final decision of a divorce proceeding is termed a "decree." The proceeding itself is usually styled a "cause" or "suit." It is commenced, not by writ, but by a petition and citation which are served together upon the respondent. But a co-respondent may be decreed to pay damages as well as costs, and, if the decree orders him to pay both, or either, he is to all intents and purposes in the same position as a judgment debtor in an action in the Chancery or Queen's Bench Division, and the same remedies by fi. fa. and elegit, or a receiver, may be had in order to render the decree effectual. Before the Divorce Act of 1857, the course of proceedings for an injured husband was, to bring an action at common law for criminal conversation against the alleged adulterer, and, if that action succeeded, to apply for an Act of Parliament to dissolve the marriage. This costly proceeding was superseded by that statute, which established a new Court in which husband and wife might by petition apply for dissolution of the marriage (s. 27); and, if the husband applies, he may join the alleged adulterer as co-respondent (s. 28); and may claim damages against him, either by that or by a separate petition (s. 33); and the Court may (s. 34) order the co-respondent to pay all or any part of the costs of the proceedings. By s. 31, the dissolution of the marriage is to be by the "decree" of the Court. In ss. 33 and 34, relating to the damages and costs which the co-respondent may be ordered to pay, the word "decree" is not used. But s. 33 provides, that all the enactments contained in the Act with reference to the hearing and decision of petitions, shall apply to the hearing of a petition for damages, and by s. 34 the order for costs may be made when the alleged adulterer is a co-respondent to a petition for dissolution. In practice, I presume, the order usually is made, as it was here, as part of the decree.

Now, it seems to me that no difference can for this purpose be made between a decree giving damages and costs against a co-respondent, and a decree giving costs only.

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If the later Act, the Bankruptcy Act of 1883, has excepted such a person from its description of a judgment debtor who commits an act of bankruptcy by failing to comply with a bankruptcy notice, there does not appear to be any sufficient reason for such an exception.

But, pursuing the investigation, the Judicature Act of 1873 united the Court of Chancery, the Courts of Common Law, of Probate, Admiralty, the Divorce Court, and the London Court of Bankruptcy, into one Supreme Court of Judicature in England (s. 3), and, by ss. 4 and 5, made them the High Court, and by s. 16 vested in that High Court the jurisdiction of each and every of them, and also of the Courts created by Commissioners of Assize. Sect. 100 provides that, in the construction of that statute, "cause" "shall include any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown"; "suit" shall include "action"; "action" "shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court, and shall not include a criminal proceeding by the Crown"; and "judgment" shall include decree. Therefore, a "suit or cause" includes an "action," and a "judgment" includes a "decree."

The Bankruptcy Act of 1883 was passed ten years later, and, when it speaks of a "judgment creditor," why should not the word "judgment" include a "decree"?

In the Court of Chancery proceedings were formerly called suits, and the decision of a suit was by decree. The suit was commenced by bill, and the appearance of the defendants was obtained by writ of subpœna, or, in certain cases, by service of a copy of the bill. By Order I. of the Rules of Court suits in Chancery are to be called actions, and by Order II. are to be commenced by writ, and by Order XL. the judgment of the Court is to be obtained by motion for judgment. Order LXVIII. provides that nothing in the rules shall, save as expressly provided, affect the procedure or practice in proceedings for divorce. Accordingly, the Divorce Court is governed by its own rules in these respects, and its causes or suits are not called actions, and its decisions are not called judgments, but decrees. This, and,

as I think, this only, creates the difficulty. In strict language, a decree of the Divorce Court is not called a "judgment," nor is a suit for divorce called an "action." Sect. 4 of the Bankruptcy Act, 1883, contains eight sub-sections, every one of which applies to this debtor, unless sub-s. 1 (*g*) is an exception. Sub-s. 1 (*e*) provides that "execution levied by seizure and sale" of a debtor's goods "under process in an action in any Court, or in any civil proceeding in the High Court," shall be an act of bankruptcy. Therefore, if there had been such an execution by seizure and sale under this decree, as, I understand, according to the ordinary practice in the Divorce Court, there might be, if the co-respondent had goods which could be seized, he might be made a bankrupt. But in sub-s. 1 (*e*) there are the words, "in any civil proceeding in the High Court," which, it is said, would include this decree in the Divorce Court. However, I cannot see any reason for ascribing to the legislature an intention to allow the debtor to be made bankrupt under sub-s. 1 (*e*) and not under sub-s. 1 (*g*).

Cotton, L.J., in *Ex parte Chinery* (1), and again in *Ex parte Moore* (2), said that, as under sub-s. 1 (*g*) there is a new act of bankruptcy, created for the first time by the Act of 1883, "we ought to give the words their strict meaning." This language was adopted by the Master of the Rolls in *In re Riddell.* (3)

Following that rule of construction, I most reluctantly come to the conclusion that "judgment in an action" does not strictly describe or include a decree in a suit for divorce. Therefore, the decision in the Court below was right, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *J. G. Dalzell; Ward, Perks, & McKay.*

(1) 12 Q. B. D. 342. (2) 14 Q. B. D. 627.
(3) 20 Q. B. D. 512.

W. L. C.

C. A.
1892
Dec. 16.

[IN THE COURT OF APPEAL.]

LONDON COUNTY COUNCIL, APPELLANTS; ASSESSMENT COMMITTEE OF WOOLWICH UNION, RESPONDENTS.

LONDON COUNTY COUNCIL, APPELLANTS; ASSESSMENT COMMITTEE OF ST. GEORGE'S UNION, RESPONDENTS.

Poor Rate—Rateable Value — Beneficial Occupation — Hypothetical Tenant—Sewage Works—Pumping Station—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 135, 150—*Metropolis Management Amendment Act*, 1858 (21 & 22 *Vict. c.* 104), *ss.* 1, 3, 23—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41) *s.* 40, *sub-ss.* 8, 9; *s.* 65.

The Metropolitan Board of Works, under their statutory powers, erected on land which they acquired for the purpose sewage deodorizing works and a pumping-station, as part of the main drainage system of the metropolis. By the Local Government Act, 1888, s. 40, sub-s. 8, the powers, liabilities and property of the board were transferred to the London County Council. The sewage works and the pumping-station were rated to the poor-rate of the parishes in which they were respectively situated. Upon appeals against the rate, special cases were stated by quarter sessions for the opinion of the Court. The case relating to the sewage works stated that the county council did not derive any pecuniary profit from the premises, and that the works were maintained by them under statutory provisions; that the county council were the only possible tenants of the premises so long as they remained part of the metropolitan system, and that, if the premises belonged to a private owner, he would let, and the county council would hire, them for the purpose of being used in connection with and as part of the metropolitan system at a yearly rent sufficient to support the gross and rateable values of 20,567*l.* and 17,139*l.* respectively; but that, if the premises were not used in connection with and as part of the metropolitan system, but were entirely disconnected therefrom and applied to any other use for which they could be made available, the gross value would be 1200*l.* and the rateable value 1000*l.*

The case relating to the pumping-station contained similar statements, and the quarter sessions found that, if the premises were not used for the main drainage, but were disconnected therefrom and in the hands of a tenant who applied them to any other use for which they might be made available, and the county council were not taken into consideration as possible tenants, the gross value of the premises would be 1597*l.* and the rateable value 1318*l.*:—

Held, by the Court of Appeal, in both cases, that the principle of *London County Council* v. *Overseers of West Ham* ([1892] 2 Q. B. 44) applied; that the county council could not be taken into consideration as hypothetical tenants; and that, for the purpose of rating, the premises must be assessed with reference to their value if they were not used in connection with the main drainage system, but were occupied for any other purpose for which they might be made available.

THE appeal in the first of the above cases was by the London County Council against the dismissal by a Divisional Court

(Wright and Collins, JJ.) of their appeal from the decision of the quarter sessions for the county of London upon an appeal from a decision of the assessment committee of the Woolwich Union, as to an objection made by the present appellants to the overseers' valuation list made in May, 1890, for the parish of Woolwich, in the above union, by virtue of which decision the present appellants were assessed, as owners and occupiers of works and buildings and land, situate in the said parish, and known as the Northern Outfall Deodorizing Works, at £28,000 as the gross value, and 23,000*l.* as the rateable value. The quarter sessions altered the valuation list by reducing the assessment to 20,567*l.* as the gross value, and 17,139*l.* as the rateable value, subject to a special case to be stated for the opinion of the Queen's Bench Division upon the questions of law arising. The London County Council contended that the reduction was insufficient in amount.

The appeal in the second case was by the London County Council against the dismissal by the same Divisional Court of their appeal from the affirmance by the same quarter sessions of a decision of the assessment committee of the St. George's Union, upon an objection made by the present appellants to the overseers' valuation list for the parish of St. George, Hanover Square, in that union, made in May, 1890, in which list the present appellants were assessed in respect of land, buildings, pumping-station, machinery, &c., situate in Grosvenor Road in the said parish, and whereof the present appellants were the owners and occupiers, at 5858*l.* as the gross value, and 3994*l.* as the rateable value. The quarter sessions dismissed the appeal, subject to a special case to be stated for the opinion of the Queen's Bench Division upon the questions of law arising.

The two appeals raised the same questions of law and were heard together, both in the Divisional Court and in the Court of Appeal.

The special case relating to the Woolwich Union contained the following statements:—

"1. The London County Council, the appellants, are the governing body of the administrative county of London, and are, by virtue of the provisions of 51 & 52 Vict. c. 41, the successors

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to the Metropolitan Board of Works, and are the present owners of the deodorizing and outfall works, machinery, land, and buildings, the subject-matter of this appeal. The appellants have to discharge all the duties of the Metropolitan Board of Works in reference to the drainage of the metropolis.

"2. Pursuant to powers and duties contained in the various Acts passed for the better government and drainage of the metropolis, and known as the Metropolis Management Acts, 1855, 1858, and 1862, the Metropolitan Board of Works and the appellants designed and constructed a system of drainage and of treatment of sewage for the metropolitan area. Such system is hereinafter referred to as 'the said metropolitan system.' Under the said system the land in question was purchased by the Metropolitan Board of Works; and the necessary works, buildings, and machinery have since been constructed thereon by the Metropolitan Board of Works and by the appellants, for the purpose of storing, deodorizing, and otherwise treating the sewage drained from the whole of the metropolitan area north of the Thames, which averages from 96 to 126 millions of gallons daily.

"3. The said works, buildings, and machinery were specially designed and constructed for the work which they have to do in connection with, and for the purposes of, the metropolitan system, of which they form an essential part.

"4. The said land, works, buildings, and machinery were and are suitable and necessary to enable the appellants to discharge their statutory duties under the said Acts, and for the advantage of the inhabitants of the metropolis to treat and dispose of the sewage, and are held, occupied, and used by the appellants in the manner and solely for the purposes herein set forth; and the appellants are entitled to levy rates upon the whole metropolitan area, including the parish of Woolwich, to enable them to occupy and use the said land, works, buildings, and machinery as aforesaid. The sewage to be treated is brought to the said premises from places outside the parish of Woolwich, and, by reason of the high level of the sewers bringing the same, the drainage of the parish of Woolwich, north of the Thames, is not admitted into the said metropolitan system.

"5. The appellants do not derive any pecuniary profit from the said hereditaments, and the works are maintained by the appellants under the provisions of the above-mentioned Acts.

"6. By the provisions of 18 & 19 Vict. c. 120, s. 150, and 21 & 22 Vict. c. 104, s. 3, and the Acts amending the same, the Metropolitan Board of Works were, and the appellants are, now authorized to purchase, or take on lease or otherwise, land for the purposes therein mentioned; and they are empowered, by 18 & 19 Vict. c. 120, s. 154, to dispose, by sale or otherwise, of the property so acquired.

"7. The Court of quarter sessions found, as a fact, that the appellants were practically the only possible tenants of the said premises, so long as they remained part of the said metropolitan system, and that if the said premises belonged to a private owner he would let, and the appellants would hire, them for the purpose of being used in connection with and as part of the said metropolitan system, at a yearly rent sufficiently high to support the gross and rateable values of 20,567*l.* and 17,139*l.* respectively.

"8. The Court of quarter sessions further found, as a fact, that if the said premises were not used in connection with, and as part of, the said metropolitan system, but were entirely disconnected therefrom, and applied to any other use or purpose for which they could be made available, the gross value thereof was 1200*l.* and the rateable value 1000*l.*

"9. The appellants contend that the said land, works, buildings, and machinery are only capable of beneficial occupation if used for purposes other than those of the said metropolitan system, and that they should be assessed at the value for which the same would let to a hypothetical tenant from year to year, supposing the said land, works, buildings, and machinery were not used as part of the said metropolitan system, but were entirely disconnected therefrom, and applied to any other use or purpose for which they could be made available, and that they should be assessed according to the rule laid down by the Court of Queen's Bench in *Metropolitan Board of Works* v. *Overseers of West Ham.* (1)

(1) Law Rep. 6 Q. B. 193.

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"10. The respondents contend, and the Court of quarter sessions, held that it is not necessary to rateability that the premises as actually occupied and utilized should yield or be capable of yielding a commercial profit, and that, under the circumstances aforesaid, the appellants do beneficially occupy the premises, and ought to be taken into account as possible hypothetical tenants of the said land, works, buildings, and machinery, and that the rule as laid down in *Reg.* v. *School Board for London* (1), and in *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union* (2) governs this case.

"If the Court should be of opinion that the contention of the appellants is correct, then the order of quarter sessions is to be quashed.

"If the Court should be of opinion that the contention of the respondents is correct, then the order of quarter sessions is to be confirmed."

The special case relating to the St. George's Union contained the following statements:—

"1. The London County Council are the county council for the administrative county of London under the provisions of the Local Government Act, 1888, and are under that Act the successors of the Metropolitan Board of Works, and are the owners and occupiers of the land, buildings, and pumping-station, and the works and machinery thereon and connected with the subject-matter of this appeal.

"2. Under the Metropolis Management Act, 1855, and the Acts amending the same, the late Metropolitan Board of Works designed and constructed the metropolitan main drainage and intercepting scheme for the purpose of the drainage of the metropolis. The lands the subject-matter of this appeal were purchased and acquired by the Metropolitan Board of Works under the said enactments for the purposes of the said scheme, and the necessary works, buildings, pumping-station, and machinery have since been constructed thereon by the Metropolitan Board of Works. Under the provisions of the Local Government Act, 1888, the said hereditaments now belong to, and are

(1) 17 Q. B. D. 738. (2) 24 Q. B. D. 197.

occupied and used by, the appellants as the successors of the said board.

"3. The said works, buildings, pumping-station, and machinery were designed and constructed for the work which they have to do in connection with and for the purpose of the metropolitan main drainage system, of which they form an essential part, and the said hereditaments are occupied and used for the purposes of such drainage.

"4. The said land, works, buildings, pumping-station, and machinery were and are suitable and necessary to enable the appellants to discharge their statutory duties under the said Acts, and to dispose of the sewage, and are held, occupied, and used by the appellants solely for the purposes herein set forth.

"5. The appellants do not derive any pecuniary profits from the said hereditaments, and the pumping-station and works are maintained by the appellants under the provisions of the above-mentioned Acts.

"6. Under the provisions of the Metropolis Management Act, 1855, and the Acts amending the same, and also under the Local Government Act, 1888, the appellants have power and are authorized to acquire, purchase, or take on lease any lands, or any easements or rights over or in any land, for the purposes in those enactments mentioned.

"7. The Court was of opinion, and found as a fact, that, if the London County Council were not the owners of the said hereditaments assessed as aforesaid, they would be willing to rent the said hereditaments for use as the said hereditaments are now used upon lease or agreement, and would be willing to pay a yearly rent for the same, for the purposes of occupying and using them as part of and in connection with the metropolitan main drainage system, and that the appellants would pay a yearly rent for the said hereditaments, used as they are now used, sufficiently high to support the gross and net rateable values respectively appearing in the said valuation list as hereinbefore mentioned. And the said Court further found as a fact that the appellants are practically the only possible tenants of the said premises as long as the said premises remain part of their main drainage system.

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"8. The Court further was of opinion, and found as a fact, that, if the said land, works, buildings, pumping-station, and machinery were not used for the Main Drainage Scheme, but were disconnected therefrom, and in the hands of a tenant who applied them to any other use or purpose for which they might be made available, and the appellants were not taken into consideration as possible tenants, then the gross value of the said land and premises for the purposes of the valuation list would be 1577*l.* and the rateable value 1318*l.*

"9. The appellants contended that the said land, works, buildings, pumping-station, and machinery are only capable of beneficial occupation if used for purposes other than the said sewage purposes, and should be rated at the value at which the same would let to a hypothetical tenant from year to year, supposing the same were not used as part of the said sewage system, but were entirely disconnected therefrom and applied to any other use or purpose for which they could be made available, and that the appellants must be excluded from consideration as possible hypothetical tenants, and that the appellants should be rated according to the rule laid down by the Court of Queen's Bench in *Metropolitan Board of Works* v. *Overseers of West Ham.* (1)

"10. The respondents contended that in assessing the hereditaments aforesaid, and fixing the gross and rateable values thereof, the appellants must be taken into consideration as possible tenants of the said hereditaments, and that their occupation is beneficial for the purposes stated, and that the principles laid down or acted on in the cases of *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union* (2) and *Reg.* v. *School Board for London* (3) were applicable to and governed this case.

"11. The Court of quarter sessions held that, in arriving at the gross and rateable values of the hereditaments assessed as aforesaid and in assessing the same, the London County Council were to be taken into consideration as possible hypothetical tenants, and held that the case was governed by the principles

(1) Law Rep. 6 Q. B. 193. (2) 24 Q. B. D. 197.
(3) 17 Q. B. D. 738.

laid down or acted on in the said cases of *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union* (1) and *Reg.* v. *School Board for London.* (2)

"If the Court should be of opinion that the contention of the appellants was correct, and that the decision of the Court of quarter sessions was erroneous in law, then the order of quarter sessions is to be quashed.

"If the Court should be of opinion that the contention of the appellants was wrong, or that the decision of the Court of quarter sessions was right in law, then the order of quarter sessions is to be confirmed."

The Divisional Court were of opinion that the cases were governed by the decisions of the Court of Appeal in *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union* (1) and *London County Council* v. *Overseers of Erith Union* (3), and dismissed the appeals. The London County Council appealed to the Court of Appeal.

Avory, and *Ryde*, for the appellants. These cases are governed by *London County Council* v. *Churchwardens of West Ham.* (4) In that case it was decided that sewers constructed by the Metropolitan Board of Works, under their statutory powers, for the purposes of the main drainage of the metropolis, were not rateable. That decision depended upon the construction of ss. 135 and 150 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120). (5)

(1) 24 Q. B. D. 197.
(2) 17 Q. B. D. 738.
(3) May 16, 1892, unreported.
(4) [1892] 2 Q. B. 44.
(5) By s. 43, the Metropolitan Board of Works was constituted as a body corporate, with powers "to take, purchase, and hold land for the purposes of this Act."

By s. 135, existing sewers and works were vested in the board, and it was provided that the board "shall make such sewers and works as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames in or near the metropolis, and shall cause such sewers and works to be completed on or before the 31st day of December, 1860, and shall also make all such other sewers and works, and such diversions or alterations of any existing sewers or works vested in them under this Act, as they may from time to time think necessary for the effectual sewerage and drainage of the metropolis, and shall discontinue, close up, or destroy such sewers for the time being vested in them under this Act as they may deem unnecessary, and such board shall from time to time repair and maintain the sewers so vested in them, or such of them as may not be discontinued,

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Those sections apply equally to the works which are now in question, and the principle of that decision applies, and shews that the works are not rateable as they have been rated. The

closed up, or destroyed as aforesaid . . . . and all sewers and works from time to time made by the said board shall vest in them."

By s. 150: "It shall be lawful for the Metropolitan Board of Works and every district board and vestry to purchase, or to take on lease for such term as they may think fit, any land, or any right or easement in or over any land, which they may deem necessary or expedient for the formation or protection of any works which they are authorized to execute under this Act, also any offices and other buildings, yards, stations, or places for deposit of refuse, materials, and things, or any land for the erection and formation of such offices and other buildings, yards, stations, or places for deposit; and also to contract for the purchase, removal, or abatement of any mill-dam, pond, weir, bank, wall, lock, or other obstruction to the flow of water, whereby sewerage or drainage is interrupted or impeded, and for the purchase of any land, or any right or easement in or over any land, which it may be necessary or expedient to purchase to prevent the obstruction of sewerage or drainage."

By the Metropolis Management Amendment Act, 1858 (21 & 22 Vict. c. 104), s. 1: "The Metropolitan Board shall cause to be commenced as soon as may be after the passing of this Act, and to be carried on and completed with all convenient speed according to such plan as to them may seem proper, the necessary sewers and works for the improvement of the main drainage of the metropolis, and for preventing, as far as may be practicable, the sewage of the metropolis from passing into the river Thames within the metropolis."

Sect. 3: "The powers of taking land given by the said Act of the 18th and 19th years of Her Majesty, and all other powers in such Act and this Act in relation to sewerage works, shall extend and be applicable as well to works for deodorizing sewage as to all other works under this Act, either within or beyond the limits of the metropolis, and all such works shall be deemed works for the purpose of the sewerage or drainage of the metropolis."

Sect. 23: "The Metropolitan Board of Works, in the meantime and until the works required by this Act for the purification of the river Thames are completed, may do all such works and apply all such means as they may deem proper for deodorizing such sewage or otherwise protecting the public health from any injurious consequences therefrom, and may defray the expenses incurred for this purpose as the expenses incurred by the said board under the said Act of the 18th and 19th years of Her Majesty are therein directed to be defrayed."

Sect. 33: "The said Act of the 18th and 19th years of Her Majesty and this Act shall be read together as one Act."

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40 (8): "There shall also be transferred to the London County Council the powers, duties, and liabilities of the Metropolitan Board of Works, and after the appointed day that board shall cease to exist, and the property, debts, and liabilities thereof shall be transferred to the London County Council, and that council shall be in law the suc-

London County Council are bound by statute to occupy these works for the purposes of the main drainage, and they cannot be taken into consideration as "hypothetical" tenants for the purpose of rating. They are not authorized by statute to take such works on lease, though they have power to purchase or take on lease land for the purpose of erecting the works. They cannot take on lease works ready made. They are the owners in fee of the works in question. Their occupation is not a beneficial one. The *Burton-upon-Trent Case* (1) and *Reg.* v. *School Board for London* (2) either do not apply, or, if they do, the Court will follow the more recent decision in *London County Council* v. *Overseers of West Ham.* (3)

Littler, Q.C., and *Sinclair Cox*, for the Assessment Committee of Woolwich Union. The unreported *Erith Case* (4), which the Divisional Court followed, applies.

[Lord Esher, M.R. The point was really not argued there. Counsel admitted (perhaps wrongly) that they could not argue it.]

Reg. v. *School Board for London* (2) exactly applies. The Metropolitan Board might have taken sewage works on lease. Under the Main Drainage Act of 1858 more extended powers were conferred on the Metropolitan Board. This Act was not referred to in the *West Ham Case.* (3) There is a distinction between sewers and sewage works; sewers must remain permanently in the land; the position of sewage works may be changed from time to time. That there is such a distinction with regard

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cessors of the Metropolitan Board of Works."

"(9.) If the London County Council borrow for the purposes of this Act, they shall borrow in accordance with the provisions of the Acts relating to the Metropolitan Board of Works, but save as aforesaid Part IV. of this Act shall apply to the London County Council when acting as successors of the Metropolitan Board of Works, and the costs incurred when so acting shall be paid out of the county fund, and the payment thereof shall be a general county purpose."

By s. 65 (which is comprised in Part IV. of the Act): "(1.) A county council may, from time to time, for the purpose of any of their powers and duties . . . . acquire, purchase, or take on lease, or exchange any lands, or any easements or rights over or in land, whether situate within or without the county, and may acquire, hire, erect, and furnish such halls, buildings, and offices as they may from time to time require, whether within or without their county."

(1) 24 Q. B. D. 197.

(2) 17 Q. B. D. 738.

(3) [1892] 2 Q. B. 44.

(4) May 16, 1892.

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to rateability is shewn by *Reg.* v. *Metropolitan Board of Works* (1); *Metropolitan Board of Works* v. *Overseers of West Ham.* (2) The question is, what is the rateable value; it is not contended that the property is not rateable at all.

Meadows White, Q.C., and *Danckwerts*, for the Assessment Committee of St. George's Union. The pumping-station adds to the value of the land. It is not a "work" within the meaning of s. 135 of the Act of 1855. It is liable to be rated, although it is occupied in connection with the sewers, which are non-rateable: *Guest* v. *Overseers of East Dean.* (3) The Local Government Act, 1888, has by s. 65, sub-s. 1, conferred on the London County Council larger powers as to the taking of land than the Metropolitan Board of Works had. This Act was not referred to in the *West Ham Case.* (4) Land might be taken on lease for the purpose of a pumping-station.

LORD ESHER, M.R. In my opinion this case is governed by the rules laid down by this Court in *London County Council* v. *Overseers of West Ham.* (4) In that case the question was raised of the rateability of certain sewers which formed part of the main drainage system of the metropolis—a system which was to be constructed and carried on under and according to ss. 135 and 150 of the Metropolis Management Act, 1855. In that case this Court had to consider whether those sewers were rateable, and we held that they were not, by reason of our interpretation of ss. 135 and 150. Sect. 150 says that "it shall be lawful for the Metropolitan Board of Works to purchase, or to take on lease for such term as they may think fit, any land which they may deem necessary or expedient for the formation or protection of any works which they are authorized to execute under this Act." Those words do not in terms apply to the drainage system; they are much larger. They include a great many other things; but we must look at the Act, and see what works the board were authorized to execute for the purpose of draining the metropolis. This sends us to s. 135. The board were empowered by s. 150 to purchase or to take on lease land for the formation or protec-

(1) Law Rep. 4 Q. B. 15, 26.
(2) Law Rep. 6 Q. B. 193.
(3) Law Rep. 7 Q. B. 334.
(4) [1892] 2 Q. B. 44.

tion of the authorized works. Then s. 135 says that they "shall make such sewers and works as they may think necessary for preventing any part of the sewage within the metropolis from flowing into the river Thames, and shall cause such sewers and works to be completed on or before a certain day, and shall also make all such other sewers and works as they may from time to time think necessary for the effectual sewerage and drainage of the metropolis." The board therefore had power under s. 150 to purchase or take on lease land for the purpose of the drainage, and they were to make sewers and works for the effectual sewerage and drainage of the metropolis, and to keep those works for that purpose. Now, whether we were right or wrong, we held in the *West Ham Case* (1), on the construction of those sections, that when the board had purchased land and had put sewers into it, those sewers and the land occupied by them were not rateable according to the rules for rating. The board had no power to let the land when they had once purchased it and used it for sewers. They had no power to let the land to a tenant, because they were bound to keep the sewers for the purpose of the drainage. They were bound to make the sewers—they could not help themselves; they could not use the land for any other purpose; they were only allowed to purchase it or to lease it for the purpose of making sewers; they could not let it; they must continue to use it for the purpose of the sewers. Therefore, there could be no hypothetical tenant of the sewers other than the board. No one else could take as a tenant a sewer which the board were bound to use themselves and to keep in complete order for the sewage. The only question was, Could the board within the meaning of *Reg.* v. *School Board for London* (2) themselves be "hypothetical" tenants. In that case we said that an owner of land might himself be a hypothetical tenant, if he could be supposed to be the tenant of the land or thing which it was proposed to rate. If he could legally be the tenant and pay a rent for the land, then he might be one of the hypothetical tenants; and we held that the London School Board could be hypothetical tenants of one of their schools. But in the *West Ham Case* (1) we held that the London County Council could

(1) [1892] 2 Q. B. 44. (2) 17 Q. B. D. 738.

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not be hypothetical tenants of their sewers, because, in order that they might be, you must suppose that there was another owner of the sewers, or of the land occupied by the sewer, and that he could let in that condition to the county council. We considered that the construction of s. 135 of the Act of 1855 was absolutely inconsistent with that supposition, for if the county council might take the sewers on lease from a landlord, you must also suppose that the landlord could insert in the lease the ordinary restrictions; for instance, that if his rent were not paid he might enter and put an end to the lease, and that would be absolutely contrary to the duty of the county council, which was to make the sewers and to keep them in order. Therefore, we held that the sewers could not be rated. In that case we were not asked to say anything about the rateability of the works. The question of rating those works was not then raised, and we left the decision of it for another occasion. The occasion has now arisen, and we have to decide, whether the other works are rateable. What are those other works? Not ordinary pumping engines, but the pumping engines which have been erected for the purpose of the Main Drainage System, and form part—an indispensable part—of it. Are these engines some of the "works" mentioned in ss. 135 and 150? Certainly they are. Are the "works" mentioned in s. 150 the same as the "works" which are mentioned in s. 135? Sect. 135 puts "sewers" and "works," part of the drainage system, on precisely the same footing in the same sentence. Therefore, if we were obliged to hold that the sewers, for the reasons which we gave, were not rateable, the conclusion must be the same with regard to the "works" which are part of the same drainage system. The Metropolitan Board were bound to make these "works" because they were necessary for the system, and, when they had made them, they were bound, and the county council are now bound, to keep them in play, because they are necessary for the drainage system. The "works" stand precisely on the same footing as the sewers, and, looking at the Act of 1855 alone, we must say that the grounds of our judgment with regard to the sewers apply equally to the "works."

But it is said that we ought now to differ from our former decision, because our attention was not then called to some other

Acts of Parliament which I think were in existence at that time. It seems a somewhat startling proposition, that the Court of Appeal can overrule their own decision because counsel neglected to call their attention to some Acts of Parliament. The first of those Acts is the Main Drainage Act of 1858 (21 & 22 Vict. c. 104). [His Lordship read s. 3.] That section does not in the least add to or take from the provisions of ss. 135 and 150 of the Act of 1855; it only says that those sections may be used for another and an additional purpose. That section, therefore, does not alter the case at all. Then s. 23 of the Act of 1858 was referred to. That section provides for the deodorizing of the sewage pending the completion of the works required for the purification of the Thames; but it does not alter in any way the powers of taking land. Then there is the Local Government Act of 1888, and it is said that s. 40, sub-ss. 8 and 9, of that Act, give a different and a greater power to the London County Council with regard to the drainage system, and with regard to the taking and using of land for that purpose, than that which previously existed. Now sub-s. 8 of s. 40 says that, "There shall be transferred to the London County Council the powers, duties, and liabilities of the Metropolitan Board of Works." If the powers, duties, and liabilities of the Metropolitan Board are transferred to the county council, they must be the same powers, duties, and liabilities which attached to the Metropolitan Board. If so, the county council has the power of taking or leasing land, and the duty to use that land only in the way mentioned in s. 135 of the Act of 1855, and the liabilities are left precisely as they were. Then sub-s. 9 provides that, "save as aforesaid, Part IV. of this Act shall apply to the London County Council when acting as successors of the Metropolitan Board of Works." Then, by s. 65, which is in Part IV. of the Act, "A county council may, from time to time, for the purpose of any of their powers and duties . . . . acquire, purchase, or take on lease, or exchange any lands, or any easements or rights over or in land." Amongst their other powers and duties is the power and duty of dealing with the drainage system according to the provisions of the former Acts. Neither of these sections, as it seems to me, in any way alters the position of the London County Council with

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regard to the drainage system from the position of the Metropolitan Board of Works. Therefore, none of those Acts now referred to alter the construction and application of the Act of 1855. Upon the construction and application of that Act, we gave our opinion in the *West Ham Case* (1), and we cannot now depart from that decision, even if it be inconsistent with some former decisions. If unfortunately our decision in the *West Ham Case* (1) is inconsistent with the view which Lush, J., took in *Reg.* v. *Metropolitan Board of Works* (2)—I am not satisfied that it is —still we are bound by our own decision in the Court of Appeal, and must act according to it. I think, therefore, that both these appeals ought to be allowed.

LOPES, L.J. In my opinion, these "works" are not hereditaments for which the county council are liable to be rated as they have been. No valid distinction can be drawn between the "works" in the present case and the "sewers" in the case of *London County Council* v. *Overseers of West Ham.* (1) I think they stand precisely on the same footing, and that the reasoning which was applicable to the sewers is applicable also to these "works."

It has been argued that if some other Acts of Parliament subsequent to the Metropolis Management Act, 1855, had been then brought to our notice they would have affected our decision in that case. The different sections of those Acts have now been elaborately brought before us, and I am satisfied that they would not, if my attention had then been called to them, have altered the view which I took in the *West Ham Case* (1), and, holding as I do that the "works" in the present case stand in exactly the same position as the sewers did there, I say that those sections do not alter my view that the present case is governed by the *West Ham Case.* (1)

I wish to make one observation with regard to rating generally, because I understand that these cases are likely to go to the House of Lords. Speaking for myself, I hope they may, because it appears to me that some of the cases on the rateability of certain hereditaments are more or less conflicting. The

(1) [1892] 2 Q. B. 44. (2) Law Rep. 4 Q. B. 15.

governing case with regard to the rating of hereditaments is *Jones* v. *Mersey Docks* (1), in which it was held that every description of property is rateable, if it is capable of beneficial occupation. If this be so, were it not for *Reg.* v. *School Board for London* (2) (of which I speak with all respect), I should have doubted whether an occupier placed under statutory restrictions, who suffers, and must suffer, a loss by the occupation of his hereditament, is the kind of hypothetical tenant who was contemplated by the Parochial Assessment Act. I have made this observation before, and I repeat it. I should have thought that the Parochial Assessment Act contemplated an ordinary tenant from year to year, whose occupation might be beneficial, and not a tenant who is forced by statute to become an occupier at a loss. I should have thought that there must be a possible beneficial occupation in order to render any hereditament rateable. Subject to this observation, which, having regard to *Reg.* v. *School Board for London* (2), I should not have made had I not understood that the whole matter is going to the House of Lords, I think that both these appeals must be allowed.

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Lopes, L.J.

KAY, L.J. This is the first case relating to this question in which I have taken any part, and I wish to make a few observations in order to shew the reasons for which I concur in the decision.

The case of *London County Council* v. *Churchwardens of West Ham* (3), came before the Court of Appeal, constituted of the Master of the Rolls, and Lopes and Fry, L.JJ. The Master of the Rolls and Lopes, L.J., have just stated their view of what that decision was, and I understand it to be this—that, although the Metropolitan Board of Works and their successors, the London County Council, have power to take land on lease for the purpose of making sewers and other drainage works, they have no power to take on lease sewers and drainage works which have been already made. "Therefore," the Master of the Rolls said in his judgment, at p. 52, "in this case there is no possible hypothetical tenant except the county council. Then can they be such

(1) 11 H. L. C. 443. (2) 17 Q. B. D. 738.
(3) [1892] 2 Q. B. 44.

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tenants? I think not, first, because, as I have said, they have no power to become tenants of the premises at all." That is explained by what he said earlier, on p. 52: "I am of opinion that they have no power to take sewers made by other people on lease." In that case the sewers which were in question had been made by the Metropolitan Board of Works; it was so stated in the special case. The question of the rateability of the other works was not then brought before the Court, and they had only to deal with sewers which had been made by the Metropolitan Board of Works and taken over by the London County Council. Those sewers, having been constructed by the Metropolitan Board of Works, and taken over by the London County Council, were sewers of which neither the Metropolitan Board nor the county council were, by the terms of their Act, authorized to take a lease. They might have taken the land on lease and have constructed the sewers in it; but they could not take an already constructed sewer upon lease, and, therefore, they could not be treated as hypothetical tenants of that of which they could never become tenants in fact. That was part of the ratio decidendi in that case, and I cannot see why that ratio decidendi does not apply equally to works for the purpose of constructing which the Metropolitan Board of Works or the London County Council might have taken land on lease. The works now in question being such as they are, it seems to me that the Metropolitan Board or the county council could not possibly, under the powers of their Act, take a lease of the works when constructed.

In my opinion, the present case comes within the principle of the decision in the *West Ham Case* (1), and the reason which I have mentioned being one of the grounds of that decision, that reason seems to me to apply equally to the present case.

There is another question to which my brother Lopes has referred—viz., whether this kind of property which is possessed by the London County Council, but of which they can never have any beneficial occupation in any sense, and which they use at a loss, can be made the subject of rating at all. Upon that point I desire to reserve my opinion, because it seems to me that

(1) [1892] 2 Q. B. 44.

it does not arise exactly here. I am inclined to think that all property which has, or may have, an annual value, is primâ facie the subject of the Rating Acts, and ought to be rated, not according to the value which it actually possesses, but according to the value which it might possibly possess.

[LOPES, L.J. That is what I meant.]

That, however, may not apply at all to land and works which are in the possession of such a body as the London County Council, but I prefer to rest my judgment upon the ground to which I have already referred, and, on that ground, I think that these appeals must be allowed, because both cases are governed by the decision in the *West Ham Case*. (1)

Ryde, asked that the appeals might be allowed with costs.

THE COURT held, in accordance with their decision in *London County Council* v. *Churchwardens, &c., of West Ham* [2] (2), that they had no power to give costs.

Appeals allowed.

Solicitors: *W. A. Blaxland; E. W. Sampson, Woolwich; W. J. Fraser.*

(1) [1892] 2 Q. B. 44. (2) [1892] 2 Q. B. 173.

W. L. C.

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[IN THE COURT OF APPEAL.]

RAMSEY *v.* CRUDDAS AND OTHERS.

Common—Copyhold—Custom for Lord to make Grants of Waste—Consent of Homage—Enfranchisement—Statutory Reservation of Right of Common—Copyhold Act, 1852 (15 & 16 *Vict. c.* 51), *s.* 45.

Where a custom existed in a manor for the lord, with the consent of the homage, to make grants of portions of the waste, to be held on copyhold tenure, although a sufficiency of common was not left :—

Held, that such a grant might be made by the lord, with the consent of the homage, as against a commoner, although his tenement had been enfranchised under the Copyhold Act, 1852, and he could therefore no longer attend the manor court.

MOTION by defendants for judgment or new trial.

The action was for trespass to land and destroying fences thereon. The statement of defence alleged, in substance, inter alia, that the land in question was part of the waste of the manor of Shenley Bury, in the county of Herts; that one Sidney Claris was possessed of certain lands and premises formerly held by copy of court roll, according to the custom of the said manor, but then enfranchised, and was entitled in respect of such lands and premises to common of pasture over the waste; and that, the fences being wrongfully erected on the waste, the defendants, as agents, and by command of the said Sidney Claris, destroyed them for the purpose of abating an obstruction to his right of common. The plaintiff replied, in substance, that, at a general court baron and customary court of the lord of the said manor, held on April 5, 1887, the lord had, with the consent of the homage, who were present and duly sworn, granted her the land in question, to hold unto her and her heirs, by copy of court roll, according to the custom of the manor; and that it had been the custom of the said manor from time immemorial for the lord of the manor to make grants with the consent of the homage of portions of the waste of the manor to be held of the lord on copyhold tenure; or, alternatively, that it had been the custom of the said manor from time immemorial for the lord to make such grants with such consent to be held as aforesaid in such

manner and to such extent that sufficiency of waste should be left to provide for the rights of common of the tenants of the said manor, or of others having rights of common within such manor, and that from and after the grant to the plaintiff such a sufficiency of waste did remain.

The case was tried before Day, J., with a jury, when the facts, so far as material to this report, appeared to be as follows: One Sidney Claris was the occupier of certain lands and premises which had formerly been copyhold of the manor of Shenley Bury, and the occupiers of which were entitled to rights of common over the waste of the manor. These lands and premises had been enfranchised on May 12, 1870, under the provisions of the Copyhold Act, 1852. On April 5, 1887, at a court baron and customary court held for the manor, a grant of a portion of the waste was made to the plaintiff by the lord of the manor, with the consent of the homage, as alleged in the reply. The plaintiff inclosed the piece of land so granted with fences. The defendants, acting as agents of Claris, entered on the land so granted to the plaintiff, and pulled down the fences as an obstruction to Claris's right of common. The jury, on evidence laid before them, consisting chiefly of entries on the rolls of the manor, found, in answer to a question left to them by the judge, that the custom existed for the lord of the manor of Shenley Bury to make grants, with the consent of the homage, of portions of the waste of the manor to be held of the lord on copyhold tenure. It appeared that evidence was given on the question whether there was a sufficiency of common left after the grant to the plaintiff, but that ultimately that issue was not left to the jury, the judge holding that the custom firstly alleged by the plaintiff and found by the jury was a good custom in law. It was agreed that any question which the judge ought to have left to the jury might be determined by the Court of Appeal. Upon the finding of the jury as above mentioned, verdict and judgment for the plaintiff were entered for 30*l.* damages. (1)

(1) 15 & 16 Vict. c. 51, s. 45, provides as follows: "Nothing herein contained shall operate to deprive any tenant of any commonable right to which he may be entitled in respect of such lands, but such right shall continue attached thereto, notwithstanding the same shall have become freehold."

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Hopkinson, Q.C., and *Blennerhassett*, for the defendants. The evidence shewed that there was not a sufficiency of common left after the grant to the plaintiff. The question whether there was ought to have been left to the jury. As the case stands, the custom found by the jury is a custom for the lord to make grants from the waste, although a sufficiency of common be not left. It is submitted that such a custom is only good as against those who consent to the grant: *Arlett* v. *Ellis* (1); *Hilton* v. *Earl Granville*. (2) The authorities, such as *Folkard* v. *Hemmett* (3), in favour of a custom to make such grants, are explained by *Arlett* v. *Ellis* (1), and shewn really to depend on the existence of consent on the part of those entitled to the rights of common. It is suggested in the note to *Boulcott* v. *Winmill* (4), that such grants of the waste with the consent of the homage are evidence of a reservation by the lord of the right to make them when the rights of common were originally created; but *Arlett* v. *Ellis* (1), and *Hilton* v. *Earl Granville* (2), shew that a reservation cannot be presumed which would be destructive of the grant, and that a custom which would be destructive of a grant cannot be good as against a person interested who dissents. The "consent of the homage" in the old authorities on the subject means the consent of the tenants having rights of common. If that be not so, it must at least mean the consent of the tenants as represented by the homage, and in this view the theory of the old law on the subject must be regarded as being that the consent of the homage is in law to be considered as the consent of all the tenants of the manor. The consent of the homage would not bind a person not a tenant of the manor who might be entitled to a right of common, inasmuch as he could not attend the manor court, and would not be represented by the homage present thereat. After the enfranchisement of his tenement, Claris was in the position of such an outsider. He was no longer a tenant of the manor, nor able to attend the court. His right of common being preserved in existence after the enfranchisement by s. 45 of 15 & 16 Vict. c. 51, he was in the position of a person having a right of common appurtenant to a freehold tenement. It is

(1) 7 B. & C. 346.
(2) 5 Q. B. 701.
(3) 5 T. R. 417 (note).
(4) 2 Camp. 261.

submitted that the intention of that Act is to free the right of common accessorial to the tenement enfranchised from manorial incidents equally with the tenement to which it is accessory: *Brabant* v. *Wilson*. (1) If the plaintiff's contention that the custom binds the owner of the enfranchised tenement be correct, his right would not be preserved: it would not be the same as before the enfranchisement, because before the enfranchisement his right could not have been taken away except by the consent of the homage at a manorial court at which he could attend and which he might influence.

[KAY, L.J. The effect of the defendants' contention is that the right of the enfranchised tenant would not merely be preserved, but greatly enlarged, because the right originally reserved to the lord of making grants with the consent of the homage, on their shewing, is gone.

LOPES, L.J. Surely the 45th section of 15 & 16 Vict. c. 51 is only a saving section.]

It is obvious that the right cannot in any case be preserved after the enfranchisement with exactly the same incidents as before; for instance, the mode of devolution would be different from what it would have been if the property had remained copyhold. It is contended that the intention apparent from the general scope of the Act is that the right of common hitherto actually enjoyed shall be preserved freed from manorial incidents. See the preamble and ss. 1, 7 of the Act.

[KAY, L.J. The incidents of the right, such as mode of devolution, may be altered; but the right as against the lord is not enlarged by the Act. It is not a mere incident of the right that it is subject to a right of the lord to enclose with the consent of the homage. It is a limitation of the right itself that it is originally made so subject.]

[They also cited *Tyrringham's Case* (2); *Lady Wentworth* v. *Clay* (3); *Robertson* v. *Hartopp* (4); *Lascelles* v. *Lord Onslow* (5); *Tilbury* v. *Silva* (6); Statute of Merton (20 Hen. 3, c. 4); Statute of Westm. 2 (13 Edw. 1, c. 46).]

(1) Law Rep. 1 Q. B. 44.
(2) 4 Rep. 382.
(3) Cas. t. Finch, 263.
(4) 43 Ch. D. 484.
(5) 2 Q. B. D. 433.
(6) 45 Ch. D. 98.

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Finlay, Q.C., and *J. F. P. Rawlinson*, for the plaintiff, were not called upon to argue. They referred the Court to the Copyhold Act, 1841 (4 & 5 Vict. c. 35), s. 91, as clearly recognising the validity of the custom found by the jury.

LORD ESHER, M.R. In this case the questions to be decided are whether the custom found by the jury is a good custom, and, if so, what the effect of it is with regard to the rights of the parties. The jury have found, as a fact, that it has been the custom of the manor from time immemorial for the lord to make grants, with the consent of the homage, of portions of the waste of the manor to be held of the lord on copyhold tenure. There was abundant evidence of the existence in point of fact of the alleged custom. The rolls of the manor were produced, and shewed as many as eighty cases in which such grants had been made, and there was no evidence adduced by the defendants to disprove such custom. There was nothing in the terms of the custom, as proved and found by the jury, to the effect that there must be a sufficiency of waste left to provide for the rights of the commoners. It must therefore be taken, I think, that what was proved, and what the jury intended to find, was a custom to make such grants of the waste, with the consent of the homage, whether there was a sufficiency of common left or not. The question then arises, whether such a custom is good. With regard to that question, we have in favour of such a custom the note of Lord Campbell to the case of *Boulcott* v. *Winmill* (1), which, no doubt, is not a conclusive or binding authority, but which is entitled to great weight. He says there: "It was formerly doubted how far a custom for the lord to make grants of the waste with the assent of the homage was good, where a sufficiency of common is not left; but it is now settled that the practice of making such grants is evidence of a right to do so reserved by the lord when he granted a right of common over the waste, and that therefore the former right is paramount to the latter." There is also the authority of De Grey, C.J., a very great lawyer, in the case of *Folkard* v. *Hemmett*. (2) Then there is the case of *Lady Wentworth* v. *Clay* (3), which is as distinct an

(1) 2 Camp. 261. (2) 5 T. R. 417 (note). (3) Cas. t. Finch, 263.

authority as can be that such a custom is good. It seems to me much too late to ask us to overrule these authorities, which, I may observe, have been treated as conclusive by the late Mr. Joshua Williams, in his Rights of Common, a book of the highest value. (1) Therefore, I am of opinion that the custom proved is a good custom.

What, then, is the result of the custom in this case? Supposing that the tenement, the owner of which is objecting to the grant to the plaintiff, had remained copyhold, what would his position be? The custom proved is that the lord may make grants of portions of the waste "with the consent of the homage." The defendants' counsel desire to construe this as equivalent to the consent of every tenant entitled to a right of common. But that is not the meaning. The case of *Lady Wentworth* v. *Clay* (2) distinctly shews that the consent of the majority of the homage is sufficient. Therefore it is wrong to say that, when the tenant was a copyholder, the grant to the plaintiff could not have been made without his consent. If he had been present at the court and dissented, his dissent might have been overruled by a majority; so that his right, when he was a tenant of the manor, was subject to the action of the majority of the homage. It was argued that, after the enfranchisement, he, being no longer a tenant of the manor, had no right to be present at the manor court, and no power of consenting or dissenting; and that what was done within the manor, therefore, could not bind him; but his enjoyment of his right must remain the same as before the enfranchisement, and could not be affected by the power of the homage. But, if he be no longer a tenant of the manor, he can have no rights as such; and the effect of the enfranchisement, apart from the saving clause in s. 45 of 15 & 16 Vict. c. 51, would appear to be to take away his right of common altogether. Being no longer a tenant of the manor, but for that section he would have no right in respect of the waste. How after the enfranchisement does he get any right over the common? Simply by virtue of the Act which reserves him a right. He can have no right, therefore, except that which is given him by the Act. The 45th section of the Act provides that "Nothing herein

(1) See Williams on Rights of Common, p. 130. (2) Cas. t. Finch, 263.

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contained shall operate to deprive any tenant of any commonable right to which he may be entitled in respect of such lands, but such right shall continue attached thereto, notwithstanding the same shall have become freehold." The meaning of that must be that, as far as possible, the enfranchisement shall not deprive him of any right of common which he had in respect of his tenement before it was enfranchised. What was the right which the tenant had? It was a right of common over the waste, subject to the right of the lord, with the consent of the homage, although he might dissent, to grant portions of the waste to be held by copy of court roll. Of that right he is not to be deprived; but the section does not say that he is to have a right which he never had before. The only reasonable construction seems to me to be that the right of the tenant is reserved, subject to the same limitation as nearly as possible as that to which it was subject before the enfranchisement. Therefore the case stands on the same footing as if Claris had continued a tenant of the manor. If it would, under the circumstances which have occurred, have been within the right of the lord to inclose this part of the waste as against him, assuming that his tenement had remained unenfranchised, it remains within the lord's right after the enfranchisement. For these reasons I think that the verdict and judgment for the plaintiff were right, and this application must be dismissed.

LOPES, L.J. The custom firstly relied on by the plaintiff in the reply, and found by the jury, is a custom for the lord of the manor, with the consent of the homage, to make grants of portions of the waste to be held of the lord on copyhold tenure. I understand that to mean that such grants may be made whether there is a sufficiency of common left or not, because the next paragraph of the reply alleges alternatively a custom to grant portions of the waste leaving a sufficiency of common. There was, in my opinion, clear proof of the existence in point of fact of the custom found. The question is whether the custom so proved is good. The authorities appear to me clearly to shew that, even when a sufficiency of common is not left, a custom for the lord, with the consent of the homage, to make grants from

the waste to be held by copy of court roll is a good custom, on the ground that the existence of it is evidence that, when the lord originally granted the rights of common, he reserved to himself the right to make such grants. But then this point was taken for the defendants. It was said that for this purpose the "consent of the homage" must be taken as equivalent to the unanimous consent of the tenants entitled to rights of common, and, applying that argument to this case, that as against an enfranchised tenant, who is no longer able to take part in the proceedings of the homage, if he dissents, the custom is gone. It was pointed out during the argument that the result of this contention, if correct, would be that, if one acre of the copyhold land were enfranchised, practically the custom would be gone as to all the rest. The case of *Lady Wentworth* v. *Clay* (1) appears to me distinctly to shew that the consent of the majority of the homage is sufficient, and that their decision is binding upon the minority who may dissent. That being so, what would the position of the tenant have been if his land had remained unenfranchised? As a copyholder of the manor he would have been subject to the custom, and the consent of the majority of the homage would have bound him. Then what is his position after the enfranchisement? That appears to me to depend entirely on the Act of Parliament. The 45th section provides that "Nothing herein contained shall operate to deprive any tenant of any commonable right to which he may be entitled in respect of such lands; but such right shall continue attached thereto, notwithstanding the same shall have become freehold." The right of the tenant before the enfranchisement was a defeasible right, subject to be defeated by the act of the lord with the consent of the homage, even although there should not be a sufficiency of common left. The effect of the section is only to preserve that defeasible right. I do not say that it can be preserved in exactly the same state as before. There must necessarily be some difference in the incidents of the right. For instance, the devolution of the title would be different, the land having become freehold. The intention seems to be to preserve the right as nearly the same as circumstances will allow

(1) Cas. t. Finch, 263.

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For these reasons I think that the judgment of the learned judge was correct and that the application fails.

KAY, L.J. I quite agree that the right found in this case to have been exercised de facto by the lord was a right, with the consent of the homage, to grant portions of the waste to be held on copyhold tenure, whether a sufficiency of common was left or not. That that is so is plainly shewn by the two paragraphs of the reply in which the right is pleaded alternatively, first without any limitation, and secondly with the limitation that there must be a sufficiency of common left. The finding of the jury adopted the first of these alternatives.

The first question that arises is whether such a right is good in law. I use the term "right" advisedly, because it seems to me in such a case more appropriate than the term "custom." The authorities appear to establish that a custom for the lord to inclose with the consent of the homage is evidence that the lord, when he originally granted the rights of common in question, reserved the right to inclose portions of the waste with the consent of the homage. The question is whether such a reservation is good. The authorities appear to be conclusive that it is; the exact point has been determined in *Lady Wentworth* v. *Clay* (1), and there seems to have been no dissent in any subsequent case from that determination. It was argued that the foundation of the right of the lord to make such grants is the consent of the persons to be affected by the inclosure; that, although they may not all actually consent, the consent of the homage must be taken to be equivalent to the consent of the persons whom they represent, viz., the whole of the tenants; and therefore that, when a copyhold tenement becomes enfranchised, the tenant, whose right of common is reserved by the statute, being no longer a copyholder of the manor, and therefore unable to be present at the court, cannot be bound by the consent of the homage. It is clear to my mind that the expression "consent of the homage" as used in the authorities does not mean the consent of every one of the tenants entitled to common rights, or even the consent of every one present at the court. The former

(1) Cas. t. Finch, 263.

meaning would be absurd, because it is obvious that the lord may inclose his own soil, if he gets the consent of every person who has any rights over it. No authority is needed for that proposition. Therefore, the meaning cannot be that the consent of every tenant is necessary. Then is the meaning that there must be the consent of every one that is present at the court? The case of *Lady Wentworth* v. *Clay* (1) is a clear authority to the contrary. It appears from that case that the consent of the majority of the homage is for this purpose the same thing as the consent of the homage. It was there held that such a custom as this is a perfectly good custom, and that the majority of the homage can bind the dissentient minority. It appears to me, therefore, plain that the consent of the homage means the consent of the majority of those present at the court, and that, with their consent, the lord may exercise his reserved right, though a minority do not consent, or even actively dissent.

Then it was said that under the 45th section of the Act of 1852 the right of common which the copyholder had is still to be preserved after the enfranchisement; and that the right would not be exactly the same, if the plaintiff's contention were correct, because the former right was a right of common which could not be taken away without the possibility of the copyholder being himself present at the court, and objecting, and perhaps influencing the conclusion at which the homage arrived. There is no doubt that difference. After the enfranchisement he is no longer a copyholder of the manor; he is not one of the homage, and therefore cannot be present or influence the court. But then, as has been said, we must surely read this section as its language imports, viz., as meaning that the tenant is not to be deprived of his pre-existing right, not as conferring upon him a new or larger right. The terms of the section do not import the creation of a new right, but only the preservation, as far as possible, of the old right—that is, a right of common subject to the reserved and paramount right of the lord to inclose portions of the waste with the consent of the homage. If the argument for the defendants were correct, the enfranchised tenant would get a right which would not be the same right at

(1) Cas. t. Finch, 263.

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all—a right which would be limited in a different way, and would be so much enlarged as practically to destroy the reserved right of the lord altogether. The effect of the argument is that, as the enfranchised tenant can no longer be one of the homage, there can be no consent of the homage as against him, and therefore, if he chooses to dissent, the homage cannot effectively consent. But it seems to me quite extravagant to suggest that a section which merely says that the tenant is not to be deprived of his right has the effect of giving such an extraordinarily greater right than he had before. On the other hand, the tenant is not substantially injured by the construction we are putting on the Act. After enfranchisement, he still has his right of common, and the homage, before consenting to an inclosure, may consider whether there will be a sufficiency of common left; and in considering that question they must necessarily take into account the rights of all persons entitled to common, including the enfranchised tenant. Therefore, he is protected in a similar manner, though perhaps not quite to the same extent as before. He gets a great advantage by the enfranchisement; and I think that there is no injustice in holding that the reservation to him is of a right as nearly as possible the same as his former right, it not being possible to reserve exactly the same right to him, because he has ceased to be a member of the homage.

Application dismissed.

Solicitor for the plaintiff: *Ernest Richard Wood.*
Solicitors for the defendants: *Horne & Birkett.*

E. L.

[IN THE COURT OF APPEAL.]

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Dec. 12, 13.
1893
Jan. 14.

ATTORNEY GENERAL *v.* SMITH AND COCKS.

Revenue—Probate Duty—Bonâ fide Mistake in Valuation—Liability of Executor after close of Administration—"Person acting in the Administration of the Estate"—Customs and Inland Revenue Act, 1881 (44 & 45 *Vict. c.* 12), *s.* 32.

By s. 32 of the Customs and Inland Revenue Act, 1881, it is provided that, if at any time it "shall be discovered that the personal estate and effects of a deceased person were at the time of the grant of the probate of greater value than the value mentioned in the certificate, the person acting in the administration of such estate and effects shall deliver a further affidavit with an account to the Commissioners of Inland Revenue duly stamped for the amount which, with the duty (if any) previously paid in respect of such estate and effects, shall be sufficient to cover the duty chargeable according to the true value thereof."

A testator bequeathed certain pictures and other property to be held by trustees as heirlooms. His executors caused a valuation to be made for probate purposes, and delivered to the Commissioners of Inland Revenue an affidavit of value, with an account on the basis of such valuation duly stamped in accordance with the provisions of the Customs and Inland Revenue Act, 1881. Upon this a certificate was issued, stating the value, as shewn by the account, and probate was granted. Some time after the executors had finally wound up the estate it was discovered that one picture had been omitted from the valuation, and that the others had been considerably undervalued. No suggestion was made of any negligence on the part of the executors, or of any incompetence on the part of the valuer. On an information praying that the executors might be ordered to deliver a further affidavit and account in accordance with the provisions of s. 32:—

Held, by the Court of Appeal, affirming the decision of the Divisional Court, that the executors, having completed the duties of administration, were not "persons acting in the administration of the estate" within the meaning of the section, and were not liable.

APPEAL from a judgment of a Divisional Court (Hawkins and Wills, JJ.). (1)

The following short statement will be sufficient for the purpose of the present report:—

W. C. Smith, by his will, dated April 18, 1879, bequeathed certain pictures and other property, to be held by trustees as heirlooms. He died in 1883, and his executors caused a valuation

(1) [1892] 2 Q. B. 289.

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to be made for probate purposes, and delivered to the Commissioners of Inland Revenue an affidavit of value with an account duly stamped in accordance with the provisions of the Customs and Inland Revenue Act, 1884 (44 & 45 Vict. c. 12), and probate was duly granted on the basis of such valuation. One of the pictures included in the bequest was accidentally omitted in the valuation; the others were valued at 1194*l.* 10*s.* The testator's estate was fully wound up by the executors in March, 1886, and since that time the executors had not acted in any way in the administration of the estate. In 1888 an order was obtained by the tenant for life under the Settled Land Act for the sale of the pictures which had been left as heirlooms, and they were all accordingly sold for 14,500*l.*, 500*l.* being the price realized for the picture which had been omitted from the valuation. An information was then filed by the Attorney General for the purpose of obtaining from the executors a further affidavit and account, under s. 32 of the above-mentioned Act (1), on the ground of one of the pictures having been omitted, and the others considerably undervalued.

No imputation was made against the executors for negligence or against the valuer for incompetence. The Divisional Court gave judgment for the defendants on the ground that the executors, having completed the duties of administration, were not persons "acting in the administration of the estate" within the meaning of the statute, and therefore were not liable. From this judgment the Attorney General, on behalf of the Crown, appealed.

(1) 44 & 45 Vict. c. 12, s. 32: "If at any time it shall be discovered that the personal estate and effects of the deceased were at the time of the grant of probate or letters of administration of greater value than the value mentioned in the certificate, or that any deduction for debts or funeral expenses was made erroneously, the person acting in the administration of such estate and effects shall, within six months after the discovery, deliver a further affidavit with an account to the Commissioners of Inland Revenue duly stamped for the amount which with the duty, if any, previously paid on an affidavit in respect of such estate and effects, shall be sufficient to cover the duty chargeable according to the true value thereof, and shall at the same time pay to the said Commissioners interest on such amount at the rate of 5*l.* per cent. per annum, from the date of the grant, or from such subsequent date as the said Commissioners may in the circumstances think proper."

Sir C. Russell, A.G., and *Vaughan Hawkins*, for the Crown.
Cozens-Hardy, Q.C., and *Dibdin*, for the executors.
Vaughan Hawkins, in reply.

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1893. Jan. 14. A. L. SMITH, L.J., delivered the judgment of the Court (Lindley, Bowen, and A. L. Smith, L.JJ.) as follows:— The facts relating to this information are fully set forth in the judgments of Hawkins and Wills, JJ. (1), and need not be recapitulated. The point to be determined is, What is the true meaning of the phrase "The person acting in the administration of such estate and effects" in s. 32 of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12)? Does it mean the person who has acted by applying for and obtaining probate or letters of administration, or the person who is acting in the administration of the estate at the time the question arises as to the payment of further duty? By 48 Geo. 3, c. 149, s. 38, executors and others, intromitting in Scotland with the effects of deceased persons, were to exhibit an inventory thereof in the Commissary Court there, duly stamped, and if at any subsequent period a discovery should be made of any other effects belonging to the deceased, an additional inventory or inventories were to be made verified by an affidavit by "any person or persons intromitting with or assuming the management of such effects, and in default a penalty was imposed." By 55 Geo. 3, c. 184, prior Acts were repealed, and the duties therein prescribed were imposed upon probate of wills and letters of administration in England and upon confirmations of testaments, testamentary or dative, and inventories to be exhibited in the Commissary Courts in Scotland. By s. 41 of this Act it was enacted that, "Where any person on applying for the probate of a will or letters of administration" should have estimated the estate and effects of the deceased to be less than the same should afterwards prove to be, and should in consequence have paid too little duty, it should be lawful for the Commissioners of Stamps, on delivery to them of an affidavit of the value of the estate, to cause the probate or letters of administration to be duly stamped on payment of the full duty, and a further sum or penalty payable by law for

(1) [1892] 2 Q. B. 289.

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stamping deeds after execution; and there was a proviso that the penalty might be remitted if the application was made within six months after the true value of the estate was ascertained and there had been no intention to deceive. By s. 43 it was enacted that where too little duty should have been paid in consequence of mistake or misapprehension, "if an executor or administrator acting under such probate or letters of administration" should not within six months after the passing of the Act or after discovery of the mistake or misapprehension apply to the Commissioner of Stamps to make up the duty which ought to have been paid, he should forfeit 100*l.*, together with 10 per cent. upon the deficiency. Now, pausing here, what is the meaning of the terms "any person applying for the probate of a will or letters of administration" and "any executor or administrator acting under such probate or letters of administration"? They appear to cover, firstly, the case of the person who was applying for the probate and letters of administration; and, secondly, the case of the person who, having obtained them, was then acting as executor or administrator under them. It was pointed out by Wills, J., in his judgment, that if the words "acting under such probate or letters of administration" were to have no meaning attached to them, he did not see why they were inserted, for the words "executor or administrator" would carry all that was desired—and in this we agree. The terms of the Scotch Act appear to be synonymous with the words "an executor acting under such probate." The words are, not "any person who has intromitted or has assumed the management of such estate," but "intromitting with or assuming the management," which we read, "is intromitting with or is assuming" such management. In our judgment these sections limited the liabilities therein imposed to those executors or administrators who were in fact acting when the liability arose, and the liabilities did not attach to those who, having once been executors or administrators, had ceased to act, having fully administered the estate of their deceased. In the year 1842, by 5 & 6 Vict. c. 82, the probate duty in Ireland, theretofore imposed by other statutes, was assimilated to that payable in Great Britain.

Such being the state of the law prior to 1881, we now come to

the Act upon which the present question arises—viz., 44 & 45 Vict. c. 12. It will be noticed that ss. 27, 28, and 29 use the same phrase as s. 41 of 55 Geo. 3, c. 184—viz., "The person applying for the probate or letters of administration." In s. 31 the phrase is, "If at any time after the grant . . . . and during the administration." In ss. 32, 35, and 37, the last phrase is omitted, and there is inserted, "The person acting in the administration of such estate and effects." This is equivalent to the phrase, "an executor or administrator acting under such probate or letters of administration." In s. 43 it is, "the person acting in the execution of the will." Neither the Attorney General nor Mr. Vaughan Hawkins was able to give any intelligible reason for these alterations of language, though one would suppose, if the Act had been carefully drawn, that some such reason would have become apparent. In these circumstances, what does s. 32 mean? The Crown argues that the true reading is that the executor or administrator who has applied for and has obtained the probate or letters of administration is the person to file the affidavit and personally pay for the extra stamp, no matter whether he has long since ceased to act, having fully administered the estate, and has no assets whereout to recoup himself. The defendants' reading is that the executor or administrator who is acting at the time the mistake is discovered is the person to file the affidavit and pay, for he personally would be able to recoup himself out of the estate he is administering, and that the section does not apply to an executor or administrator who has ceased to act, having fully administered the estate. There is obviously this result, if the last reading be correct—viz., that at times the Crown may be unable to obtain the duty which it was entitled to; but we can find nothing in the Act of 1881 to shew any intention to alter the liability of an executor or administrator from that which theretofore existed, and we may add that it would appear from Mr. Hanson's book that the practice of Somerset House has been only to look to the executor or administrator whilst the estate was being administered. In the next place, if the Crown's contention is right, it leads to what is a manifest absurdity—viz., that the executor of an executor might be personally liable for an accidental omission of the first executor which took place

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whilst that executor was administering the estate of his testator, the mistake not being discovered until after the death of the first executor. Mr. Vaughan Hawkins, in reply, finding he could not maintain this proposition, abandoned it, and he then said that s. 32 applied only to the personal liability of the executor who had made the mistake. By this means he hoped to surmount the difficulty; but we can find in the section no such limitation of liability, if the words "the person acting in the administration of such estate" are read as applying to a person who had once acted by taking out probate or letters of administration. An executor, it must be remembered, is not usually liable to pay out of his own assets for the acts of his testator, and yet upon the Crown's construction of the section he may be. We are fully alive to the difficulty presented by s. 37. It is pointed out, and with truth, that the words in s. 32 and in s. 37 are the same, and it is said that if s. 32 be read as the defendants contend, then the Crown may be deprived of the three years within which it may require explanations under s. 37. This is so; but we answer that when once the Crown abandoned its claim to look to the executor of an executor it abandoned its indefeasible right to the three years under s. 37, for an executor might well die within three years, and it had to be admitted that then the Crown's right was at an end. In the result, we read the words in s. 32 as meaning the person who is acting in the administration of the estate when the mistake is discovered, and if there is then no such person, the estate having been fully administered, the Crown is without remedy. It must not be forgotten that this is a taxing Act imposing pecuniary burdens, and it is well settled that all charges upon the subject must be imposed by clear and unambiguous language. This certainly is not so in the present case, and no one can say that it is. In our judgment, this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for Crown: *The Solicitor of Inland Revenue.*
Solicitors for defendants: *Wade & Lyall.*

M. W.

LAWSON, Petitioner; CHESTER MASTER, Respondent.

(The Cirencester Election Petition.)

1893 *Jan.* 13.

Parliament—Election Petition—Change of Venue—"Special Circumstances"—Parliamentary Elections Act, 1868 (31 & 32 *Vict. c.* 125), *s.* 11, *sub-s.* 11.

The existence of special circumstances which render it desirable that the petition should be tried elsewhere than in the borough or county in which the election took place is a condition precedent to the power to change the place of trial of a parliamentary election petition from such borough or county, and the fact that the inquiry is of such a nature that the trial can be more cheaply and conveniently held elsewhere does not constitute such special circumstances.

Application by the petitioner for an order under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), s. 11, sub-s. 11 (1), to appoint the metropolis as the place for the trial of a petition against the return of the respondent as member of Parliament for the Cirencester Division of Gloucestershire. The place of trial had already been changed from the Cirencester Division to Gloucester; but the order had been made without prejudice to any further application that might be made to change the place of trial. From an affidavit used in support of the application, it appeared that the petition contained charges of illegal practices, but that, owing to failure to obtain evidence in support of these charges, the time for delivery of particulars had been allowed to expire, and no particulars had been delivered; so that, the charges of illegal practices having been abandoned, the only questions which remained to be tried related to the validity of certain ballot papers, twenty on one side and forty-two on the other, which had been reserved for a

(1) By 31 & 32 Vict. c. 125, s. 11, sub-s. 11, the trial of an election petition, in the case of a petition relating to a county election, shall take place in the county, "provided always that if it shall appear to the Court that special circumstances exist which render it desirable that the petition should be tried elsewhere than in the . . . county, it shall be lawful for the Court to appoint such other place for the trial as shall appear most convenient."

By the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), s. 9, sub-s. 1, counties returning more than one member are to be divided into the same number of divisions as the number of members; and by sub-s. 3 "the law relating to parliamentary elections shall apply to each such division as if it were a separate county."

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scrutiny; and one question as to a tendered vote, as to which it would be necessary to call a few witnesses. It was stated that the inquiry would take only a short time.

A. T. Lawrence, for the petitioner, in support of the application. Sufficient special circumstances exist to bring the case within 31 & 32 Vict. c. 125, s. 11, sub-s. 11; and having regard to the fact that the inquiry will be little more than a scrutiny, and very few witnesses will be called, it is desirable, in the interest of both parties, that the trial should take place in the metropolis. Whatever may be the result of the trial, considerable expense will necessarily be saved if the application is granted. [He referred to *Collins* v. *Price*. (1)]

J. C. Lewis Coward, for the respondent. If the charges of illegal practices were persisted in, the respondent would oppose this application; but, as those charges are withdrawn, he consents to it.

LORD COLERIDGE, C.J. I am of opinion that this application ought to be refused. On looking at the object of the statute, it is apparent that one great point aimed at is to secure that the trial shall be held at the place to which the petition refers. There is no ground on which the Court can interfere to change the place of trial, unless special circumstances exist such as to make it desirable that the trial shall take place elsewhere. When such special circumstances exist giving jurisdiction, the Court may then consider the question of convenience; but the existence of special circumstances is a condition precedent to the exercise of jurisdiction. The argument put forward in support of this application involves the rejection of the necessity for the existence of special circumstances, and if we were to accede to it our decision would have the effect of giving power to order the place of trial to be changed to wherever the Court might think it most convenient that the petition should be tried. The fact that the petition resolves itself into a scrutiny was not intended to be a special circumstance within the meaning of the Act, and therefore is not such a special circumstance as can confer the

(1) 5 C. P. D. 544.

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power of taking away the trial of the petition from the borough or county in which the election took place. I am also of opinion that mere questions of expense are not special circumstances within the meaning of the Act. According to the argument in support of the application, the place of trial might be changed in any case in which it would be more convenient or less expensive that the trial should be held in some place outside the borough or county; but the Act does not say that this is to be so. The trial of election petitions is meant to be local in the absence of special circumstances. I will not attempt to give an exhaustive definition of the special circumstances which would be sufficient; but instances may be given, such as the over-preponderating influence of some great man in the district, or an excited state of political feeling on one side or the other, or on both sides, and the probability that such excited state of feeling might bring about a riot. There must be such special circumstances as to render the trial of the petition elsewhere than in the borough or county not merely more convenient, but more conducive to the ends of justice. It would be dangerous to consider the question of convenience alone.

CAVE, J. I am of the same opinion. Personally, I should be glad to accede to the desire of both parties; but I think it is impossible on the language of the Act to hold that, because it would be more convenient and cheaper to hold the trial in London, the Court is entitled to change the place of trial. I agree with the Lord Chief Justice, and think that he has given the correct interpretation of the Act.

Application refused. (1)

Solicitors for petitioner: *H. P. & J. W. Cobb.*

Solicitors for respondent: *Peacock & Goddard, for Mullings, Ellett & Co., Cirencester.*

(1) See *Arch* v. *Bentinck*, 18 Q. B. D. 548.

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In the Matter of the ILKLEY HOTEL COMPANY.

Company—Winding-up—County Court—Jurisdiction—Title to Property—Question between the Liquidator and a Stranger—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 98, 164—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63).

Where a petition to wind up a company is presented to a county court under 53 & 54 Vict. c. 63, s. 1, sub-s. 3, the judge of the county court has no jurisdiction to make an order deciding a question as to title to property, which arose before the commencement of the winding-up, between the company and a stranger.

Appeal from an order of the judge of the county court at Leeds directing the appellant to deliver up certain wine to the liquidator of the Ilkley Hotel Company.

The wine in question had been transferred by the manager of the company to the appellant before the presentation of the petition for winding up the company to the county court at Leeds, under the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63). (1) The liquidator applied for an order, declaring the transfer of the wine to the appellant to be a fraudulent preference within the meaning of s. 164 of the Companies Act, 1862 (25 & 26 Vict. c. 89). The county court judge came to the conclusion that the manager had no authority from the company to make the transfer, and therefore there was no fraudulent preference on the part of the company, but the transfer was void, and he ordered the appellant to give up the wine to the liquidator.

(1) By the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 1, sub-s. 1, jurisdiction to wind up companies is conferred on the county court.

By sub-s. 3: "Where the amount of the capital of a company paid up or credited as paid up does not exceed 10,000*l.*, and the registered office of the company is situate within the jurisdiction of a county court having jurisdiction under this Act, a petition to wind up the company or to continue the winding-up of the company under the supervision of the Court shall be presented to that county court."

By sub-s. 6: "Every Court having jurisdiction under this Act to wind up a company shall, for the purposes of that jurisdiction, have all the powers of the High Court."

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Yate Lee, for the appellant. The county court judge had no jurisdiction to make this order, deciding a question which arose previously to the winding-up between the company and a stranger. Where the legislature intended such jurisdiction to be exercised by a county court judge in bankruptcy, the jurisdiction was conferred by express enactment (46 & 47 Vict. c. 52, s. 102, sub-s. 1), subject to a limitation as to amount. There is no corresponding provision in the Companies Acts. It is by no means clear that the judge had jurisdiction to declare the transaction a fraudulent preference; but it is unnecessary to press this point, for the finding that the manager acted without authority negatives fraudulent preference on the part of the company.

Muir Mackenzie, for the liquidator. As to fraudulent preference, there would be jurisdiction under s. 164 of the Companies Act, 1862 (25 & 26 Vict. c. 89); but, independently of this point, jurisdiction is conferred by the general power in s. 98 of the same Act, to "cause the assets of the company to be collected and applied in discharge of its liabilities," which is extended to the county court by the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63). Sects. 100 and 153 of the Act of 1862 also shew an intention to confer extensive jurisdiction.

[The following decisions were referred to: *In re Inns of Court Hotel Company* (1); *Re Liverpool and London Guarantee and Accident Insurance Company, Gallagher and Others' Case* (2); *In re Civil Service and General Store.* (3)]

CAVE, J. It appears to me to be quite clear that the county court judge had no jurisdiction to make the order which he has made in this case. An application was made to him to declare the transfer of certain wine to the appellant to be a fraudulent preference. The question was raised in argument whether he had any jurisdiction to accede to that application and declare the transaction to be a fraudulent preference. As to that question, I give no opinion. It is unnecessary to decide the point, because the county court judge came to the conclusion that there

(1) Law Rep. 6 Eq. 82. (2) 46 L. T. (N.S.) 54.
(3) 57 L. J. (Ch.) 119.

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had been no fraudulent preference by the company, on the ground that what was done was done by the manager acting without authority, and therefore there had been no valid transfer of the wine; and he thereupon ordered the delivery of the wine to the liquidator. The question to be decided is whether he had authority to make that order. By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 102, sub-s. 1, the judge of the High Court in bankruptcy has authority to make orders of a nature similar to this; and a county court judge in bankruptcy has a like jurisdiction where the amount in dispute does not exceed in value 200*l.*: but this jurisdiction is subject to the right of appeal, not only on questions of law, but also on questions of fact. The provisions of the Winding-up Acts are altogether different. There is nothing in those Acts approaching in wideness of scope to the provision in the Bankruptcy Act to which I have referred. Sect. 98 of the Companies Act, 1862 (25 & 26 Vict. c. 89), has been referred to in support of the contention that the jurisdiction exists; but obviously that section only contains a very general statement of the power to collect and apply the assets. Where there is no dispute, the official liquidator takes possession of and distributes the assets; but this is quite consistent with the view that the Act does not give the Court any power to decide such a question as the county court judge has decided in the present case. The functions of the Court are administrative; and there is no ground for collecting from the language of the Acts an implied power to decide such a question as this. Several other sections have been referred to in support of the respondent's contention; but none of them contain provisions similar to those of the Bankruptcy Act. It is important to consider the consequences of giving effect to the opposite view. The result would be that a county court judge would have power to entertain a dispute between the company and a stranger without any limit corresponding to the limit of 200*l.* fixed by the Bankruptcy Act: and, moreover, there would be no appeal from his decision except on a question of law; so that if a question of fact were decided dealing with an amount of 20,000*l.*, there would be no possibility of an appeal. This would be a very different state of affairs from that resulting from the provisions of the Bankruptcy Act.

There is nothing in any of the statutes to shew an intention to confer such an extended jurisdiction. It is a power which no judge of the High Court possesses; for in the case of a decision by a judge of the High Court, whether with or without a jury, there is an appeal to the Court of Appeal and to the House of Lords; whereas in the present case, if the respondent's contention were correct, the county court judge would have jurisdiction to make orders without any limit as to amount, and in many cases without appeal. For these reasons, I am of opinion that our decision must be in favour of the appellant.

LORD COLERIDGE, C.J., concurred.

Appeal allowed.

Solicitors for appellant: *Farmer, Carpenter, & Rawson.*

Solicitors for respondent: *Field, Roscoe & Co., for Taylor, Jeffery, & Jessop, Bradford.*

P. B. H.

CARR *v.* FOWLE.

1893 *Jan.* 16.

Tithes—Hop-grounds or Market-gardens—Rent-charge in lieu of Extraordinary Charge—Exemption from Land Tax—49 & 50 Vict. c. 54, ss. 3, 4, sub-s. 5.

The annual rent-charge payable under the Extraordinary Tithe Redemption Act, 1886 (49 & 50 Vict. c. 54), in lieu of the extraordinary charge previously levied, under the Tithe Commutation Acts, on hop-grounds, orchards, fruit plantations, and market-gardens, is exempt from land tax.

SPECIAL CASE stated in an action brought to recover a sum of 17*l.* 10*s.* 4*d.*

The plaintiff was the vicar of the parish of Marden, in Kent, and the defendant was the collector to the local commissioners for the land tax.

On February 5, 1892, the defendant distrained upon certain goods in the vicarage of the plaintiff as a distress for non-payment of the land tax, and the plaintiff, to prevent the sale after seizure, paid 17*l.* 10*s.* 4*d.* under protest.

The distress was levied in respect of land tax, alleged by the defendant to be due in respect of the new rent-charge payable to the plaintiff, as vicar of the parish, which was substituted by the

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Extraordinary Tithe Redemption Act, 1886 (1), for the former extraordinary charge.

The plaintiff admitted that the distress was legal and proper in all respects if the new rent-charge was not exempt from land tax.

The question for the opinion of the Court was whether, upon the proper construction of the Act, the new rent-charge was exempted from or liable to assessment to the land tax.

Stevenson Moore, (*F. Meadows White*, *Q.C.*, with him), for the plaintiff. The extraordinary charge payable on hop-grounds or market-gardens under the Tithe Act, 1836 (6 & 7 Wm. 4, c. 71), was, no doubt, liable to land tax (see ss. 40, 42, 69), for under that statute the tax was not deducted, and remained payable; but it is otherwise in the case of the rent-charge substituted for the extraordinary charge by the Extraordinary Tithe Redemption Act, 1886 (49 & 50 Vict. c. 54), for s. 3 of that Act expressly provides that in estimating the value of the extraordinary charge for which this rent-charge is substituted "the commissioners shall take into consideration the net annual value of the same, after allowing for the expenses of collection, rates, taxes (except income tax), and other outgoings." The effect of this provision is that the land tax is deducted from the amount of the rent-charge payable to the vicar, whereby he gets so much less, and if he has afterwards to pay the tax he is paying it twice over. The words at the end of s. 4, sub-s. 5, exempting the rent-charge from "any parochial, county, or other rate, charge, or assessment,"

(1) 49 & 50 Vict. c. 54. By s. 3: "For the purpose of estimating the capital value of the said charge the commissioners shall take into consideration the net annual value of the same, after allowing for the expenses of collection, rates, taxes (except income tax), and other outgoings, the value of the land subject to the said charge, the length of time during which the said charge has been paid, the prospect of the continuance or discontinuance of the special cultivation in respect of which the said charge is imposed, the right of the cultivator to discontinue such special cultivation at any time and thereby to cause the suspension of the said charge, the prospect of the substitution of other land on the same farm for such cultivation . . . and any other special circumstances applicable to the farm or parcel of land under consideration." By sect. 4, sub-s. 5: "The said rent-charge shall not be subject to any parochial, county, or other rate, charge, or assessment."

are wide enough to include land tax, and should be read as co-extensive with the words of s. 3.

Channell, Q.C. (*T. Willes Chitty*, with him), for the defendant. This rent-charge is a hereditament, and therefore liable to land tax under the Land Tax Act, 1797 (38 Geo. 3, c. 5), made perpetual by the Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60), unless exempted by subsequent legislation: *Metropolitan Ry. Co.* v. *Fowler*. (1) Such exemption should be express; it will not be implied: *Lord Colchester* v. *Kewney*. (2) In order to ascertain whether the exemption exists, it is necessary, in the first instance, to look at the exemption clause in the Act of 1886, which is the last clause of s. 4, sub-s. 5. The words are "parochial, county, or other rate," &c., but by s. 69 of the Tithe Act, 1836, the extraordinary charge was "subject to all parliamentary, parochial, and county and other rates, charges, and assessments." The effect is that the rent-charge is exempt from parochial and county, but not from parliamentary, rates, &c., and therefore not from land tax: *Waterloo Bridge Co.* v. *Cull*. (3) This being so, there is nothing in s. 3 to extend the exemption.

DAY, J. I am of opinion that the plaintiff is entitled to judgment, on the ground that the rent-charge which is substituted for the previously existing extraordinary charge under the Extraordinary Tithe Redemption Act, 1886 (49 & 50 Vict. c. 54), is exempt from land tax. I come to this conclusion mainly on the construction of s. 3 of the Act, which comes before s. 4, sub-s. 5, in natural as well as in numerical order. We must consider first what is the subject to be dealt with, and that is the rent-charge which is substituted by the Act for the old extraordinary charge. In s. 3 the origin of the tithe rent-charge is dealt with, and the method of getting at the amount is pointed out, which is by taking into consideration, among other circumstances, the net annual value of the extraordinary charge previously payable, "after allowing for the expenses of collection, rates, taxes (except income tax), and other outgoings." It is clear, therefore, that

(1) [1892] 1 Q. B. 165. (2) Law Rep. 2 Ex. 253.
(3) 1 E. & E. 213.

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in getting at the capital value it is necessary to deduct the expenses of collection. Formerly there would have been expenses incurred in the collection of the extraordinary tithe, but it might be expected that the substituted rent-charge could be collected without incurring those expenses; and, therefore, it was reasonable that in estimating the value the expenses should be deducted. Then the deductions include rates and taxes (except income tax), for it was intended that the rent-charge should be subject to income tax, and the deductions further include other outgoings. It is contended on behalf of the plaintiff that his case is strengthened by the provision in s. 4, sub-s. 5, that "the said rent-charge shall not be subject to any parochial, county, or other rate, charge, or assessment." Mr. Channell, on the other hand, contends that s. 4, sub-s. 5, must be looked at first, and then s. 3, and that if the Act is looked at in this way it shews that the rent-charge is liable. But, as I said before, I am of opinion that s. 3 must be looked at first. Then it is contended that the word "assessment" in s. 4, sub-s. 5, is not applicable to parliamentary taxes; but I do not assent to that contention. Looking at the precise words used in s. 3, I do not feel inclined to put Mr. Channell's construction on s. 4, sub-s. 5. I am of opinion that the Act was intended to protect the rent-charge from being assessed by parishes or counties, but that the right was reserved to Parliament to assess it if such a course should be expedient. The words were used with the view of not excluding the right of Parliament to assess the rent-charge; but this does not make the rent-charge liable to the land tax, from which it would otherwise be exempted by s. 3. It may or may not be that a new rent-charge, altogether independent of this statute, would be liable to land tax. I do not decide anything as to that; but I wish to point out that s. 4, sub-s. 5, does not make this particular rent-charge liable to land tax. It would be a serious injustice that, after the owner had deducted the land tax, the vicar should be obliged to pay it again, for in substance the result would be that he would pay it twice over. Unless the words were very clear and precise, I should be unwilling to attribute such an intention to the legislature. Here the words are not clear and precise to that effect;

but, in my opinion, the fair and reasonable construction of the statute is that the rent-charge substituted for the extraordinary charge is not subject to land tax, and, therefore, the plaintiff is entitled to judgment.

COLLINS, J. I am of the same opinion, and I do not think that the case presents much difficulty. A new rent-charge is created by 49 & 50 Vict. c. 54, and is substituted for the previously existing extraordinary charge. The subject of the extraordinary charge was hop-grounds, orchards, fruit plantations, and market-gardens, and the extraordinary charge having been found to be an impediment to agriculture, the Act has substituted a payment to the vicar of 4 per cent. per annum on the capital value of the extraordinary charge; and by s. 3, the capital value is to be calculated on the net annual value, after allowing certain deductions, the value of the land, the length of time during which the charge has been paid, the prospect of the continuance or discontinuance of the special cultivation, and the right to discontinue it, the prospect of the substitution of other land for such cultivation, and other special circumstances. The annual value is arrived at by allowing the number of years' purchase which the commissioners think fair. In making the calculation, they must deduct the land tax by deducting from each annual value the sum payable for land tax. I think the words of s. 3 are clear; they are, "shall take into consideration the net annual value of the same after allowing for the expenses of collection, rates, taxes (except income tax), and other outgoings." The effect is to exclude income tax and to include land tax in the deductions to be made in considering the net annual value. That being the machinery, and the charge being created free of land tax, is there anything else in the statute which has the effect of imposing the tax? Mr. Channell relies on the provision at the end of s. 4, sub-s. 5, that the charge "shall not be subject to any parochial, county, or other rate, charge, or assessment." But these words cannot be held to apply only to parochial and county rates, for there is also the word "other," and the words are quite large enough to include land tax. Mr. Channell also relies on the case of the *Waterloo*

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Bridge Co. v. *Cull* (1); but in that case the word was "parochial" only, whereas here the words are "parochial, county, or other." Moreover, the clause at the end of s. 4, sub-s. 5, is a relieving clause, and it is no answer to the plaintiff's contention to say that it does not relieve from this tax, because this tax is not imposed by the Act; so that on either view of s. 4, sub-s. 5, the rent-charge is not liable to land tax, because that tax is not imposed upon it. It is immaterial to consider whether a newly-created rent-charge, not coming within this statute, would or would not be liable to land tax, because I am clearly of opinion that in this case the rent-charge is not liable.

Judgment for the plaintiff.

Solicitor for plaintiff: *E. W. I. Peterson.*

Solicitors for defendant: *Kingsford, Dorman & Co., for Philpott & Callaway, Cranbrook.*

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Dec. 6, 7.

[IN THE COURT OF APPEAL.]

CARLILL *v.* CARBOLIC SMOKE BALL COMPANY.

Contract—Offer by Advertisement—Performance of Condition in Advertisement—Notification of Acceptance of Offer—Wager—Insurance—8 & 9 *Vict.* c. 109—14 *Geo.* 3, c. 48, s. 2.

The defendants, the proprietors of a medical preparation called "The Carbolic Smoke Ball," issued an advertisement in which they offered to pay 100*l.* to any person who contracted the influenza after having used one of their smoke balls in a specified manner and for a specified period. The plaintiff on the faith of the advertisement bought one of the balls, and used it in the manner and for the period specified, but nevertheless contracted the influenza:—

Held, affirming the decision of Hawkins, J., that the above facts established a contract by the defendants to pay the plaintiff 100*l.* in the event which had happened; that such contract was neither a contract by way of wagering within 8 & 9 Vict. c. 109, nor a policy within 14 Geo. 3, c. 48, s. 2; and that the plaintiff was entitled to recover.

APPEAL from a decision of Hawkins, J. (2)

The defendants, who were the proprietors and vendors of a medical preparation called "The Carbolic Smoke Ball," inserted in the *Pall Mall Gazette* of November 13, 1891, and in other

(1) 1 E. & E. 213. (2) [1892] 2 Q. B. 484.

newspapers, the following advertisement: "100*l.* reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. 1000*l.* is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.

"During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

"One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10*s.*, post free. The ball can be refilled at a cost of 5*s.* Address, Carbolic Smoke Ball Company, 27, Princes Street, Hanover Square, London."

The plaintiff, a lady, on the faith of this advertisement, bought one of the balls at a chemist's, and used it as directed, three times a day, from November 20, 1891, to January 17, 1892, when she was attacked by influenza. Hawkins, J., held that she was entitled to recover the 100*l.* The defendants appealed.

Finlay, Q.C., and *T. Terrell*, for the defendants. The facts shew that there was no binding contract between the parties. The case is not like *Williams* v. *Carwardine* (1), where the money was to become payable on the performance of certain acts by the plaintiff; here the plaintiff could not by any act of her own establish a claim, for, to establish her right to the money, it was necessary that she should be attacked by influenza—an event over which she had no control. The words express an intention, but do not amount to a promise: *Week* v. *Tibold.* (2) The present case is similar to *Harris* v. *Nickerson.* (3) The advertisement is too vague to be the basis of a contract; there is no limit as to time, and no means of checking the use of the ball. Anyone who had influenza might come forward and depose that he had used the ball for a fortnight, and it would be

(1) 4 B. & Ad. 621. (2) 1 Roll. Abr. 6 (M.).
(3) Law Rep. 8 Q. B. 286.

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impossible to disprove it. *Guthing* v. *Lynn* (1) supports the view that the terms are too vague to make a contract; there being no limit as to time, a person might claim who took the influenza ten years after using the remedy. There is no consideration moving from the plaintiff: *Gerhard* v. *Bates* (2). The present case differs from *Denton* v. *Great Northern Ry. Co.* (3), for there an overt act was done by the plaintiff on the faith of a statement by the defendants. In order to make a contract by fulfilment of a condition, there must either be a communication of intention to accept the offer, or there must be the performance of some overt act. The mere doing an act in private will not be enough. This principle was laid down by Lord Blackburn in *Brogden* v. *Metropolitan Ry. Co.* (4) The terms of the advertisement would enable a person who stole the balls to claim the reward, though his using them was no possible benefit to the defendants. At all events, the advertisement should be held to apply only to persons who bought directly from the defendants. But, if there be a contract at all, it is a wagering contract, as being one where the liability depends on an event beyond the control of the parties, and which is therefore void under 8 & 9 Vict. c. 109. Or, if not, it is bad under 14 Geo. 3, c. 48, s. 2, as being a policy of insurance on the happening of an uncertain event, and not conforming with the provisions of that section.

Dickens, Q.C., and *W. B. Allen* for the plaintiff. [THE COURT intimated that they required no argument as to the question whether the contract was a wager or a policy of insurance.] The advertisement clearly was an offer by the defendants; it was published that it might be read and acted on, and they cannot be heard to say that it was an empty boast, which they were under no obligation to fulfil. The offer was duly accepted. An advertisement was addressed to all the public—as soon as a person does the act mentioned, there is a contract with him. It is said that there must be a communication of the acceptance; but the language of Lord Blackburn, in *Brogden* v. *Metropolitan Ry. Co.* (4), shews that merely doing the acts indicated is an acceptance of the proposal. It never was intended

(1) 2 B. & Ad. 232.
(2) 2 E. & B. 476.
(3) 5 E. & B. 860.
(4) 2 App. Cas. 666.

that a person proposing to use the smoke ball should go to the office and obtain a repetition of the statements in the advertisement. The defendants are endeavouring to introduce words into the advertisement to the effect that the use of the preparation must be with their privity or under their superintendence. Where an offer is made to all the world, nothing can be imported beyond the fulfilment of the conditions. Notice before the event cannot be required; the advertisement is an offer made to any person who fulfils the condition, as is explained in *Spencer* v. *Harding*. (1) *Williams* v. *Carwardine* (2) shews strongly that notice to the person making the offer is not necessary. The promise is to the person who does an act, not to the person who says he is going to do it and then does it. As to notice after the event, it could have no effect, and the present case is within the language of Lord Blackburn in *Brogden* v. *Metropolitan Ry. Co.* (3) It is urged that the terms are too vague and uncertain to make a contract; but, as regards parties, there is no more uncertainty than in all other cases of this description. It is said, too, that the promise might apply to a person who stole any one of the balls. But it is clear that only a person who lawfully acquired the preparation could claim the benefit of the advertisement. It is also urged that the terms should be held to apply only to persons who bought directly from the defendants; but that is not the import of the words, and there is no reason for implying such a limitation, an increased sale being a benefit to the defendants, though effected through a middleman, and the use of the balls must be presumed to serve as an advertisement and increase the sale. As to the want of restriction as to time, there are several possible constructions of the terms; they may mean that, after you have used it for a fortnight, you will be safe so long as you go on using it, or that you will be safe during the prevalence of the epidemic. Or the true view may be that a fortnight's use will make a person safe for a reasonable time. Then as to the consideration. In *Gerhard* v. *Bates* (4), Lord Campbell never meant to say that if there was a direct invitation to take shares, and shares were taken on the faith of it, there was

(1) Law Rep. 5 C. P. 561.
(2) 4 B. & Ad. 621.
(3) 2 App. Cas. 666.
(4) 2 E. & B. 476.

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no consideration. The decision went on the form of the declaration, which did not state that the contract extended to future holders. The decision that there was no consideration was qualified by the words "as between these parties," the plaintiff not having alleged himself to be a member of the class to whom the promise was made.

Finlay, Q.C., in reply. There is no binding contract. The money is payable on a person's taking influenza after having used the ball for a fortnight, and the language would apply just as well to a person who had used it for a fortnight before the advertisement as to a person who used it on the faith of the advertisement. The advertisement is merely an expression of intention to pay 100*l.* to a person who fulfils two conditions; but it is not a request to do anything, and there is no more consideration in using the ball than in contracting the influenza. That a contract should be completed by a private act is against the language of Lord Blackburn in *Brogden* v. *Metropolitan Ry. Co.* (1). The use of the ball at home stands on the same level as the writing a letter which is kept in the writer's drawer. In *Denton* v. *Great Northern Ry. Co.* (2) the fact was ascertained by a public, not a secret act. The respondent relies on *Williams* v. *Carwardine* (3), and the other cases of that class; but there a service was done to the advertiser. Here no service to the defendants was requested, for it was no benefit to them that the balls should be used: their interest was only that they should be sold. Those cases also differ from the present in this important particular, that in them the service was one which could only be performed by a limited number of persons, so there was no difficulty in ascertaining with whom the contract was made. It is said the advertisement was not a legal contract, but a promise in honour, which, if the defendants had been approached in a proper way, they would have fulfilled. A request is as necessary in the case of an executed consideration as of an executory one: *Lampleigh* v. *Braithwait* (4); and here there was no request. Then as to the want of limitation as to time, it is conceded that the defendants cannot have meant to contract without some

(1) 2 App. Cas. 692.
(2) 5 E. & B. 86.
(3) 4 B. & Ad. 621.
(4) 1 Sm. L. C. 9th ed. pp. 153, 157, 159.

limit, and three limitations have been suggested. The limitation "during the prevalence of the epidemic" is inadmissible, for the advertisement applies to colds as well as influenza. The limitation "during use" is excluded by the language "after having used." The third is, "within a reasonable time," and that is probably what was intended; but it cannot be deduced from the words; so the fair result is that there was no legal contract at all.

LINDLEY, L.J. [The Lord Justice stated the facts, and proceeded:—] I will begin by referring to two points which were raised in the Court below. I refer to them simply for the purpose of dismissing them. First, it is said no action will lie upon this contract because it is a policy. You have only to look at the advertisement to dismiss that suggestion. Then it was said that it is a bet. Hawkins, J., came to the conclusion that nobody ever dreamt of a bet, and that the transaction had nothing whatever in common with a bet. I so entirely agree with him that I pass over this contention also as not worth serious attention.

Then, what is left? The first observation I will make is that we are not dealing with any inference of fact. We are dealing with an express promise to pay 100*l.* in certain events. Read the advertisement how you will, and twist it about as you will, here is a distinct promise expressed in language which is perfectly unmistakable—"100*l.* reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the influenza after having used the ball three times daily for two weeks according to the printed directions supplied with each ball."

We must first consider whether this was intended to be a promise at all, or whether it was a mere puff which meant nothing. Was it a mere puff? My answer to that question is No, and I base my answer upon this passage: "1000*l.* is deposited with the Alliance Bank, shewing our sincerity in the matter." Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in

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aid by the advertiser as proof of his sincerity in the matter—that is, the sincerity of his promise to pay this 100*l.* in the event which he has specified. I say this for the purpose of giving point to the observation that we are not inferring a promise; there is the promise, as plain as words can make it.

Then it is contended that it is not binding. In the first place, it is said that it is not made with anybody in particular. Now that point is common to the words of this advertisement and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer. In point of law this advertisement is an offer to pay 100*l.* to anybody who will perform these conditions, and the performance of the conditions is the acceptance of the offer. That rests upon a string of authorities, the earliest of which is *Williams* v. *Carwardine* (1), which has been followed by many other decisions upon advertisements offering rewards.

But then it is said, "Supposing that the performance of the conditions is an acceptance of the offer, that acceptance ought to have been notified." Unquestionably, as a general proposition, when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified. But is that so in cases of this kind? I apprehend that they are an exception to that rule, or, if not an exception, they are open to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked, and if notice of acceptance is required—which I doubt very much, for I rather think the true view is that which was expressed and explained by Lord Blackburn in the case of *Brogden* v. *Metropolitan Ry. Co.* (2)—if notice of acceptance is required, the person who makes the offer gets the notice of acceptance contemporaneously with his notice of the performance of the condition. If he gets notice of the acceptance before his offer is revoked, that in principle is all you want. I, however, think that the true view, in a case of this kind, is that the person who makes the offer shews by his language and from the nature of the transaction that he

(1) 4 B. & Ad. 621. (2) 2 App. Cas. 666, 691.

does not expect and does not require notice of the acceptance apart from notice of the performance.

We, therefore, find here all the elements which are necessary to form a binding contract enforceable in point of law, subject to two observations. First of all it is said that this advertisement is so vague that you cannot really construe it as a promise—that the vagueness of the language shews that a legal promise was never intended or contemplated. The language is vague and uncertain in some respects, and particularly in this, that the 100*l.* is to be paid to any person who contracts the increasing epidemic after having used the balls three times daily for two weeks. It is said, When are they to be used? According to the language of the advertisement no time is fixed, and, construing the offer most strongly against the person who has made it, one might infer that any time was meant. I do not think that was meant, and to hold the contrary would be pushing too far the doctrine of taking language most strongly against the person using it. I do not think that business people or reasonable people would understand the words as meaning that if you took a smoke ball and used it three times daily for two weeks you were to be guaranteed against influenza for the rest of your life, and I think it would be pushing the language of the advertisement too far to construe it as meaning that. But if it does not mean that, what does it mean? It is for the defendants to shew what it does mean; and it strikes me that there are two, and possibly three, reasonable constructions to be put on this advertisement, any one of which will answer the purpose of the plaintiff. Possibly it may be limited to persons catching the "increasing epidemic" (that is, the then prevailing epidemic), or any colds or diseases caused by taking cold, during the prevalence of the increasing epidemic. That is one suggestion; but it does not commend itself to me. Another suggested meaning is that you are warranted free from catching this epidemic, or colds or other diseases caused by taking cold, whilst you are using this remedy after using it for two weeks. If that is the meaning, the plaintiff is right, for she used the remedy for two weeks and went on using it till she got the epidemic. Another meaning, and the one which I rather prefer, is that the reward is offered to

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any person who contracts the epidemic or other disease within a reasonable time after having used the smoke ball. Then it is asked, What is a reasonable time? It has been suggested that there is no standard of reasonableness; that it depends upon the reasonable time for a germ to develop! I do not feel pressed by that. It strikes me that a reasonable time may be ascertained in a business sense and in a sense satisfactory to a lawyer, in this way; find out from a chemist what the ingredients are; find out from a skilled physician how long the effect of such ingredients on the system could be reasonably expected to endure so as to protect a person from an epidemic or cold, and in that way you will get a standard to be laid before a jury, or a judge without a jury, by which they might exercise their judgment as to what a reasonable time would be. It strikes me, I confess, that the true construction of this advertisement is that 100*l.* will be paid to anybody who uses this smoke ball three times daily for two weeks according to the printed directions, and who gets the influenza or cold or other diseases caused by taking cold within a reasonable time after so using it; and if that is the true construction, it is enough for the plaintiff.

I come now to the last point which I think requires attention—that is, the consideration. It has been argued that this is nudum pactum—that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. It is said that the use of the ball is no advantage to them, and that what benefits them is the sale; and the case is put that a lot of these balls might be stolen, and that it would be no advantage to the defendants if the thief or other people used them. The answer to that, I think, is as follows. It is quite obvious that in the view of the advertisers a use by the public of their remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore, the advertisers get out of the use an advantage which is enough to constitute a consideration.

But there is another view. Does not the person who acts upon this advertisement and accepts the offer put himself to some inconvenience at the request of the defendants? Is it nothing

to use this ball three times daily for two weeks according to the directions at the request of the advertiser? Is that to go for nothing? It appears to me that there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise.

We were pressed upon this point with the case of *Gerhard* v. *Bates* (1), which was the case of a promoter of companies who had promised the bearers of share warrants that they should have dividends for so many years, and the promise as alleged was held not to shew any consideration. Lord Campbell's judgment when you come to examine it is open to the explanation, that the real point in that case was that the promise, if any, was to the original bearer and not to the plaintiff, and that as the plaintiff was not suing in the name of the original bearer there was no contract with him. Then Lord Campbell goes on to enforce that view by shewing that there was no consideration shewn for the promise to him. I cannot help thinking that Lord Campbell's observations would have been very different if the plaintiff in that action had been an original bearer, or if the declaration had gone on to shew what a société anonyme was, and had alleged the promise to have been, not only to the first bearer, but to anybody who should become the bearer. There was no such allegation, and the Court said, in the absence of such allegation, they did not know (judicially, of course) what a société anonyme was, and, therefore, there was no consideration. But in the present case, for the reasons I have given, I cannot see the slightest difficulty in coming to the conclusion that there is consideration.

It appears to me, therefore, that the defendants must perform their promise, and, if they have been so unwary as to expose themselves to a great many actions, so much the worse for them.

BOWEN, L.J. I am of the same opinion. We were asked to say that this document was a contract too vague to be enforced.

The first observation which arises is that the document itself is not a contract at all, it is only an offer made to the public.

(1) 2 E. & B. 476.

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The defendants contend next, that it is an offer the terms of which are too vague to be treated as a definite offer, inasmuch as there is no limit of time fixed for the catching of the influenza, and it cannot be supposed that the advertisers seriously meant to promise to pay money to every person who catches the influenza at any time after the inhaling of the smoke ball. It was urged also, that if you look at this document you will find much vagueness as to the persons with whom the contract was intended to be made—that, in the first place, its terms are wide enough to include persons who may have used the smoke ball before the advertisement was issued; at all events, that it is an offer to the world in general, and, also, that it is unreasonable to suppose it to be a definite offer, because nobody in their senses would contract themselves out of the opportunity of checking the experiment which was going to be made at their own expense. It is also contended that the advertisement is rather in the nature of a puff or a proclamation than a promise or offer intended to mature into a contract when accepted. But the main point seems to be that the vagueness of the document shews that no contract whatever was intended. It seems to me that in order to arrive at a right conclusion we must read this advertisement in its plain meaning, as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it? It was intended unquestionably to have some effect, and I think the effect which it was intended to have, was to make people use the smoke ball, because the suggestions and allegations which it contains are directed immediately to the use of the smoke ball as distinct from the purchase of it. It did not follow that the smoke ball was to be purchased from the defendants directly, or even from agents of theirs directly. The intention was that the circulation of the smoke ball should be promoted, and that the use of it should be increased. The advertisement begins by saying that a reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic after using the ball. It has been said that the words do not apply only to persons who contract the epidemic after the publication of the advertisement, but include persons who had pre-

viously contracted the influenza. I cannot so read the advertisement. It is written in colloquial and popular language, and I think that it is equivalent to this: "100*l.* will be paid to any person who shall contract the increasing epidemic after having used the carbolic smoke ball three times daily for two weeks." And it seems to me that the way in which the public would read it would be this, that if anybody, after the advertisement was published, used three times daily for two weeks the carbolic smoke ball, and then caught cold, he would be entitled to the reward. Then again it was said: "How long is this protection to endure? Is it to go on for ever, or for what limit of time?" I think that there are two constructions of this document, each of which is good sense, and each of which seems to me to satisfy the exigencies of the present action. It may mean that the protection is warranted to last during the epidemic, and it was during the epidemic that the plaintiff contracted the disease. I think, more probably, it means that the smoke ball will be a protection while it is in use. That seems to me the way in which an ordinary person would understand an advertisement about medicine, and about a specific against influenza. It could not be supposed that after you have left off using it you are still to be protected for ever, as if there was to be a stamp set upon your forehead that you were never to catch influenza because you had once used the carbolic smoke ball. I think the immunity is to last during the use of the ball. That is the way in which I should naturally read it, and it seems to me that the subsequent language of the advertisement supports that construction. It says: "During the last epidemic of influenza many thousand carbolic smoke balls were sold, and in no ascertained case was the disease contracted by those using" (not "who had used") "the carbolic smoke ball," and it concludes with saying that one smoke ball will last a family several months (which imports that it is to be efficacious while it is being used), and that the ball can be refilled at a cost of 5*s.* I, therefore, have myself no hesitation in saying that I think, on the construction of this advertisement, the protection was to enure during the time that the carbolic smoke ball was being used. My brother, the Lord Justice who preceded me, thinks that the contract would be

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sufficiently definite if you were to read it in the sense that the protection was to be warranted during a reasonable period after use. I have some difficulty myself on that point; but it is not necessary for me to consider it further, because the disease here was contracted during the use of the carbolic smoke ball.

Was it intended that the 100*l.* should, if the conditions were fulfilled, be paid? The advertisement says that 1000*l.* is lodged at the bank for the purpose. Therefore, it cannot be said that the statement that 100*l.* would be paid was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon.

But it was said there was no check on the part of the persons who issued the advertisement, and that it would be an insensate thing to promise 100*l.* to a person who used the smoke ball unless you could check or superintend his manner of using it. The answer to that argument seems to me to be that if a person chooses to make extravagant promises of this kind he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them.

It was also said that the contract is made with all the world—that is, with everybody; and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to any one who, before it is retracted, performs the condition, and, although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement. It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate—offers to receive offers—offers to chaffer, as, I think, some learned judge in one of the cases has said. If this is an offer to be bound, then it is a contract the moment the person fulfils the condition.

That seems to me to be sense, and it is also the ground on which all these advertisement cases have been decided during the century; and it cannot be put better than in Willes, J.'s, judgment in *Spencer* v. *Harding*. (1) "In the advertisement cases," he says, "there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfil the contract, of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, 'and we undertake to sell to the highest bidder,' the reward cases would have applied, and there would have been a good contract in respect of the persons." As soon as the highest bidder presented himself, says Willes, J., the person who was to hold the vinculum juris on the other side of the contract was ascertained, and it became settled.

Then it was said that there was no notification of the acceptance of the contract. One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English law—I say nothing about the laws of other countries—to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating

(1) Law Rep. 5 C. P. 561, 563.

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acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

That seems to me to be the principle which lies at the bottom of the acceptance cases, of which two instances are the well-known judgment of Mellish, L.J., in *Harris's Case* (1), and the very instructive judgment of Lord Blackburn in *Brogden* v. *Metropolitan Ry. Co.* (2), in which he appears to me to take exactly the line I have indicated.

Now, if that is the law, how are we to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained. If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it, and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. He does, therefore, in his offer impliedly indicate that he does not require notification of the acceptance of the offer.

A further argument for the defendants was that this was a

(1) Law Rep. 7 Ch. 587. (2) 2 App. Cas. 666, 691.

nudum pactum—that there was no consideration for the promise—that taking the influenza was only a condition, and that the using the smoke ball was only a condition, and that there was no consideration at all; in fact, that there was no request, express or implied, to use the smoke ball. Now, I will not enter into an elaborate discussion upon the law as to requests in this kind of contracts. I will simply refer to *Victors* v. *Davies* (1) and Serjeant Manning's note to *Fisher* v. *Pyne* (2), which everybody ought to read who wishes to embark in this controversy. The short answer, to abstain from academical discussion, is, it seems to me, that there is here a request to use involved in the offer. Then as to the alleged want of consideration. The definition of "consideration" given in Selwyn's Nisi Prius, 8th ed. p. 47, which is cited and adopted by Tindal, C.J., in the case of *Laythoarp* v. *Bryant* (3), is this: "Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff, with the consent, either express or implied, of the defendant." Can it be said here that if the person who reads this advertisement applies thrice daily, for such time as may seem to him tolerable, the carbolic smoke ball to his nostrils for a whole fortnight, he is doing nothing at all—that it is a mere act which is not to count towards consideration to support a promise (for the law does not require us to measure the adequacy of the consideration). Inconvenience sustained by one party at the request of the other is enough to create a consideration. I think, therefore, that it is consideration enough that the plaintiff took the trouble of using the smoke ball. But I think also that the defendants received a benefit from this user, for the use of the smoke ball was contemplated by the defendants as being indirectly a benefit to them, because the use of the smoke balls would promote their sale.

Then we were pressed with *Gerhard* v. *Bates*. (4) In *Gerhard* v. *Bates* (4), which arose upon demurrer, the point upon which the action failed was that the plaintiff did not allege that the

(1) 12 M. & W. 758.
(2) 1 M. & G. 265.
(3) 3 Scott, 238, 250.
(4) 2 E. & B. 476.

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promise was made to the class of which alone the plaintiff was a member, and that therefore there was no privity between the plaintiffs and the defendant. Then Lord Campbell went on to give a second reason. If his first reason was not enough, and the plaintiff and the defendant there had come together as contracting parties and the only question was consideration, it seems to me Lord Campbell's reasoning would not have been sound. It is only to be supported by reading it as an additional reason for thinking that they had not come into the relation of contracting parties; but, if so, the language was superfluous. The truth is, that if in that case you had found a contract between the parties there would have been no difficulty about consideration; but you could not find such a contract. Here, in the same way, if you once make up your mind that there was a promise made to this lady who is the plaintiff, as one of the public—a promise made to her that if she used the smoke ball three times daily for a fortnight and got the influenza, she should have 100*l.*, it seems to me that her using the smoke ball was sufficient consideration. I cannot picture to myself the view of the law on which the contrary could be held when you have once found who are the contracting parties. If I say to a person, "If you use such and such a medicine for a week I will give you 5*l.*," and he uses it, there is ample consideration for the promise.

A. L. SMITH, L.J. The first point in this case is, whether the defendants' advertisement which appeared in the *Pall Mall Gazette* was an offer which, when accepted and its conditions performed, constituted a promise to pay, assuming there was good consideration to uphold that promise, or whether it was only a puff from which no promise could be implied, or, as put by Mr. Finlay, a mere statement by the defendants of the confidence they entertained in the efficacy of their remedy. Or as I might put it in the words of Lord Campbell in *Denton* v. *Great Northern Ry. Co.* (1), whether this advertisement was mere waste paper. That is the first matter to be determined. It seems to me that this advertisement reads as follows: "100*l.* reward will be paid

(1) 5 E. & B. 860.

by the Carbolic Smoke Ball Company to any person who after having used the ball three times daily for two weeks according to the printed directions supplied with such ball contracts the increasing epidemic influenza, colds, or any diseases caused by taking cold. The ball will last a family several months, and can be refilled at a cost of 5*s*." If I may paraphrase it, it means this: "If you"—that is one of the public as yet not ascertained, but who, as Lindley and Bowen, L.JJ., have pointed out, will be ascertained by the performing the condition—"will hereafter use my smoke ball three times daily for two weeks according to my printed directions, I will pay you 100*l*. if you contract the influenza within the period mentioned in the advertisement." Now, is there not a request there? It comes to this: "In consideration of your buying my smoke ball, and then using it as I prescribe, I promise that if you catch the influenza within a certain time I will pay you 100*l*." It must not be forgotten that this advertisement states that as security for what is being offered, and as proof of the sincerity of the offer, 1000*l*. is actually lodged at the bank wherewith to satisfy any possible demands which might be made in the event of the conditions contained therein being fulfilled and a person catching the epidemic so as to entitle him to the 100*l*. How can it be said that such a statement as that embodied only a mere expression of confidence in the wares which the defendants had to sell? I cannot read the advertisement in any such way. In my judgment, the advertisement was an offer intended to be acted upon, and when accepted and the conditions performed constituted a binding promise on which an action would lie, assuming there was consideration for that promise. The defendants have contended that it was a promise in honour or an agreement or a contract in honour—whatever that may mean. I understand that if there is no consideration for a promise, it may be a promise in honour, or, as we should call it, a promise without consideration and nudum pactum; but if anything else is meant, I do not understand it. I do not understand what a bargain or a promise or an agreement in honour is unless it is one on which an action cannot be brought because it is nudum pactum, and about nudum pactum I will say a word in a moment.

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In my judgment, therefore, this first point fails, and this was an offer intended to be acted upon, and, when acted upon and the conditions performed, constituted a promise to pay.

In the next place, it was said that the promise was too wide, because there is no limit of time within which the person has to catch the epidemic. There are three possible limits of time to this contract. The first is, catching the epidemic during its continuance; the second is, catching the influenza during the time you are using the ball; the third is, catching the influenza within a reasonable time after the expiration of the two weeks during which you have used the ball three times daily. It is not necessary to say which is the correct construction of this contract, for no question arises thereon. Whichever is the true construction, there is sufficient limit of time so as not to make the contract too vague on that account.

Then it was argued, that if the advertisement constituted an offer which might culminate in a contract if it was accepted, and its conditions performed, yet it was not accepted by the plaintiff in the manner contemplated, and that the offer contemplated was such that notice of the acceptance had to be given by the party using the carbolic ball to the defendants before user, so that the defendants might be at liberty to superintend the experiment. All I can say is, that there is no such clause in the advertisement, and that, in my judgment, no such clause can be read into it; and I entirely agree with what has fallen from my Brothers, that this is one of those cases in which a performance of the condition by using these smoke balls for two weeks three times a day is an acceptance of the offer.

It was then said there was no person named in the advertisement with whom any contract was made. That, I suppose, has taken place in every case in which actions on advertisements have been maintained, from the time of *Williams* v. *Carwardine* (1), and before that, down to the present day. I have nothing to add to what has been said on that subject, except that a person becomes a persona designata and able to sue, when he performs the conditions mentioned in the advertisement.

Lastly, it was said that there was no consideration, and that

(1) 4 B. & Ad. 621.

it was nudum pactum. There are two considerations here. One is the consideration of the inconvenience of having to use this carbolic smoke ball for two weeks three times a day; and the other more important consideration is the money gain likely to accrue to the defendants by the enhanced sale of the smoke balls, by reason of the plaintiff's user of them. There is ample consideration to support this promise. I have only to add that as regards the policy and the wagering points, in my judgment, there is nothing in either of them.

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Appeal dismissed.

Solicitors: *J. Banks Pittman; Field & Roscoe.*

H. C. J.

THE QUEEN *v.* JUSTICES OF MISKIN HIGHER.

1892 *Nov.* 19.

Licensing Acts — Licence — Renewal — Objection on ground of Disorderly Character of House — Evidence of Convictions of Previous Tenants — Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 26.

A notice of intention to oppose the renewal of a licence for the sale of intoxicating liquors stated as the ground of objection that the house in respect of which the licence was sought was of a disorderly character. It was admitted that the applicant was himself a man of good character; but, in support of the objection, evidence was tendered and admitted of three convictions against previous tenants for offences against the Licensing Acts. The justices refused the application for the renewal on the sole ground of the convictions of the previous tenants:—

Held, that it was competent to shew that the house was of a disorderly character without making any charge against the character of the applicant or his management of the house, and that the evidence was properly admitted.

RULE NISI for a writ of mandamus to the justices of Miskin Higher, in the county of Glamorgan, to hear and determine the application of Thomas Pitman for the renewal of a licence.

It appeared from the affidavit of the applicant that at a special sessions held in April, 1892, the applicant obtained a transfer to himself of the licence of the Angel Inn, Aberdare. The general annual licensing meeting was appointed to be held on August 23, 1892; and, on August 13, the superintendent of police served on

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the applicant a written notice of objection to the renewal of his licence, which notice specified the three following grounds of objection: (1.) that a house licensed for the sale of intoxicating liquor was not required in the neighbourhood in which the applicant's house was situate; (2.) that the house in respect of which a licence was sought was of a disorderly character; and (3.) that the house was not structurally adapted to the business carried on there. The applicant attended at the general annual licensing meeting; but his application, being opposed, was adjourned to the adjourned meeting on September 27. On September 12 a notice from the clerk to the justices was served upon the applicant, directing him to attend personally at the adjourned meeting; but the notice contained no reference to the grounds of objection. The applicant and his solicitor attended the adjourned meeting, when the clerk to the justices offered evidence to prove three convictions against previous tenants, viz., on May 1, 1888, for permitting drunkenness, on August 21, 1891, for keeping open on Sunday, and on March 15, 1892, for permitting drunkenness. The applicant's solicitor objected that the evidence was inadmissible on the ground that no such ground of objection had been specified in the notice of objection, and that the justices had, therefore, no jurisdiction to entertain the objection or to receive evidence in support of it. The justices, however, overruled the objection and admitted the evidence, and eventually the renewal was refused on the sole ground of the convictions of the previous tenants, the other objections contained in the notice of opposition being overruled.

J. V. Austin, for the justices, shewed cause. There are two grounds upon which the rule should be discharged. First, on the true reading of s. 42 of the Licensing Act, 1872, and s. 26 of the Licensing Act, 1874, as interpreted by *Sharp* v. *Wakefield* (1), where an applicant is properly before the Court on an objection made to the renewal of his licence, the justices may go into other proper grounds of objection, and if they exercise their discretion judicially may refuse the renewal. Secondly, the justices have exercised a judicial discretion on a ground of objection

(1) [1891] A. C. 173.

specified in a notice properly served, for on the face of the proceedings there was admissible evidence of the objection that the house was of a disorderly character. The offences of which the previous tenants were convicted are such as in ordinary language would be of a disorderly character. The expression "of a disorderly character" is applicable to a house as well as to an individual; it does not mean that it is frequented by bad characters, but that it has acquired a bad reputation. The language of s. 8 of the Wine and Beerhouse Act, 1869 (1), conclusively shews that a house, as distinguished from its occupier, may be of a disorderly character for the purposes of the Licensing Acts.

J. Paterson, in support of the rule, was directed to confine his argument to the second point. The evidence of the convictions of previous tenants was not admissible. The only matter relevant to the application would be that the house was disorderly in the hands of the applicant, for it is impossible to attribute a disorderly character to mere bricks and mortar as distinguished from the occupier. Under s. 8 of the Wine and Beerhouse Act, 1869, it might be successfully contended that if the applicant is of good character a previous conviction against another tenant would not be evidence.

[THE COURT. On that point the language of the section is clearly against you.]

[He cited *Reg.* v. *Justices of Merthyr Tydvil.* (2)]

LORD COLERIDGE, C.J. I am of opinion that this rule should be discharged. In substance this is an application for a mandamus to the magistrates to hear and determine the applicant's application for the renewal of his licence, to which the magistrates answer that they have heard and determined it; while the applicant replies that they have not done so, because they have

(1) Under s. 8, sub-s. 2, of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), one of the grounds of refusal of an application for a certificate under the Act is "that the house or shop in respect of which a licence is sought, or any adjacent house or shop owned or occupied by the person applying for a licence, is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character."

(2) 14 Q. B. D. 584.

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Lord Coleridge, C.J.

received improper evidence. I am unable to agree with the applicant's contention, and think that the magistrates have acted well within their jurisdiction. Whether I should have come to the same conclusion is immaterial, and I express no opinion upon it; the question of fact was for them, and it is not our business to overrule or question the decision to which they have come on the facts.

It is admitted that the applicant is a man of good character, and the objection taken (inter alia) to the renewal of his licence is that the house in respect of which the licence is sought is of a disorderly character. Evidence was given of three convictions, in 1888, 1891, and 1892, against previous occupiers, all which convictions are entirely consistent with the absence of any personal misconduct or moral guilt on the part of the present applicant, but which shew that in the judgment of the justices the house had the character of being a disorderly house. In my opinion, they were entitled so to find. It is said that bricks and mortar cannot be disorderly, and in one sense the observation is just, though I do not agree with it in the sense in which it is made by the applicant's counsel, nor do I think that it accords with what I believe to have been the obvious intention of the legislature. There is a clear distinction drawn in the statute between the applicant himself and the house in respect of which he applies. A house of a disorderly character is a parliamentary phrase; the disorderly character of the house is distinguished from the disorderly character of the applicant, who may never before making his application have been the holder of a licence. It is plain to me that the house, apart from the person, may be of a disorderly character, and therefore this was a perfectly legal objection to take.

But it is said that, even if this be so, the evidence was not receivable, because it was not evidence relating to the personal character of the applicant. It is true that it does not relate to his personal character, but it had to do with the character of the house, and it remains good evidence of the character of the house as distinguished by parliament from the character of the man. It is further said that the evidence was not sufficient to justify the decision; but that was entirely for the justices: it is obvious

that a single conviction might be cogent evidence, while under certain circumstances several convictions might not be sufficient. The objection, therefore, was legal, and the evidence was legal; the justices had a right to consider it, and they have considered it; we cannot review their decision.

The larger question has been practically settled by *Sharp* v. *Wakefield* (1), a decision which we ought not to fritter away, and on the meaning of which we must act. The point does not, however, arise in the present case, and my judgment proceeds on the ground that the justices in receiving and acting upon the evidence were acting within their jurisdiction.

WILLS, J. I am of the same opinion. I think, with the learned counsel who appeared for the justices, that the short result of *Sharp* v. *Wakefield* (1) is, that where an objection is formally made by a notice which specifies the grounds of the objection, the justices are at liberty to go into other relevant grounds of objection which suggest themselves; and if the objection is not one personal to the applicant, it is not necessary to give notice of it. In the present case, however, that principle does not apply, for the justices did act on a ground of objection specified in the notice, and the question for us is reduced to one of whether they had any legal evidence before them upon which they could so act.

The notice of objection is that the house is of a disorderly character. That is a good ground of objection, and it is relevant to the inquiry whether the justices shall exercise the absolute judicial discretion to refuse the renewal which is vested in them. It has been contended before us that the applicant must have contributed to the disorderly character of the house—that it must have been disorderly while in his hands; but with this contention I entirely disagree; the policy of the licensing Acts is much wider, and means much more than that. It is urged that the expression in the Act of Parliament is not applicable to the house, but only to the person applying for the licence; and to estimate the value of that criticism, it is worth while to turn to

(1) [1891] A. C. 173.

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the Wine and Beerhouse Act, 1869, to see what is meant by the expression that "the house is of a disorderly character." The certificates granted under that Act last only for a year, and there is nothing to prevent such a state of circumstances as this: A. is tenant up to the time for granting or renewing the certificate, when B. becomes the tenant. On the application of B. for a certificate, objection is taken on the ground that the house is of a disorderly character. If that merely means that its character is disorderly under his management, the section might as well be wiped out, for ex hypothesi the house had not yet come under B.'s management—at any rate, not for a sufficient time to be disorderly in his hands. The policy of the Acts is in quite the other direction: it provides an additional and most important security for the maintenance of good order in licensed houses, and a tenant respectable himself may fail to obtain a renewal of his licence because in the hands of successive occupiers the house has been the scene of acts which have led to convictions before the justices. It is almost needless to observe that this must prove a great incentive to landlords to have respectable tenants. Every one knows what a respectably-conducted house means, and to say that the expression "house of a disorderly character" is a solecism seems to me to be sheer nonsense. That which is done in the house is by a very common figure of speech transferred to the house itself. It is clear to me that the intention of the legislature was that, no matter in whose hands the house might be at the time of the application for the licence, or in whose hands it had been in times past, if it had the character of being disorderly stamped on it, the justices might take this into consideration and refuse the renewal of the licence. In the present case the evidence may or may not be strong; but it is legitimate evidence. One of the first questions that would be asked as to the character of a house would be whether there were any convictions against it. In the present case there were three convictions, one of them within a month of the transfer of the licence to the applicant. I think it was the deliberate intention of Parliament that in such a case the liability to lose the licence on an application for renewal should not be got rid of for

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the benefit of those concerned merely by the expedient of a transfer of the licence to a man of reputable character.

Rule discharged.

Solicitors for applicant: *Purkis & Co., for Phillips & Son, Aberdare.*

Solicitors for justices: *Bell, Brodrick, & Gray, for Lewis & Jones, Merthyr Tydvil.*

W. J. B.

MURRAY AND OTHERS, JUSTICES OF THE PEACE FOR THE CITY OF MANCHESTER *v.* FREER.

1892 *April* 27, 28.
1893 *Jan.* 19.

Licensing Acts—Licence—Lapse of—Discretion of Justices to Refuse Transfer—Licensing Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Wine and Beerhouse Act*, 1869 (32 *& 33 Vict. c.* 27), *ss.* 8, 19.

The tenant of a beerhouse which had been continuously licensed for the sale of beer to be consumed on the premises from a date prior to May 1, 1869, was convicted of permitting drunkenness on the premises, and in consequence of such conviction the justices at the general annual licensing meeting in August, 1891, refused to renew his licence, which in consequence expired on October 10, 1891. In the interval, on October 5, 1891, the tenant yielded up possession of the house to the respondent, who, on November 17, 1891, applied to the justices at special sessions for a transfer of the licence:—

Held, that the licence was, at the date of such application, "in force" within the meaning of s. 19 of the Wine and Beerhouse Act, 1869, and that the justices' power of refusing the transfer was limited to the four grounds mentioned in s. 8 of that Act.

CASE stated by quarter sessions.

The Pheasant Inn, No. 155, Charter Street, Manchester, was continuously licensed for the sale of beer to be consumed on and off the premises from a date prior to May 1, 1869, until October 10, 1891, when the certificate of justices granted in respect of the said house pursuant to 32 & 33 Vict. c. 27, ss. 5, 6, which had been in force from October 10, 1890, expired.

The said certificate and the excise licence were granted to one John Faulkner, who was a tenant of the said house and had been previously licensed in respect thereof.

On December 30, 1890, the said Faulkner was convicted of permitting drunkenness in the said house.

At the general annual licensing sessions held on August 27,

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1891, for the city of Manchester, the justices, on an objection being made to the renewal of the licence to the said house by the superintendent of police for the district, adjourned the consideration thereof to September 10, and on that day Faulkner applied to them for a renewal of the licence, which was refused. Faulkner did not appeal from the refusal to renew the said licence, but on October 5, 1891, he removed from and yielded up possession of the house to the respondent, Isaac Freer.

On October 9, 1891, the respondent gave notice, under s. 14 of 9 Geo. 4, c. 61, of his intention to apply to the special sessions for a transfer of the said licence and in pursuance of such notice, on November 17, 1891, he applied, pursuant to the said section, for a transfer of the licence of the house to him. It was contended on his behalf that the justices could only refuse the transfer upon one of the four grounds set forth in s. 8 of 32 & 33 Vict. c. 27, and it was admitted by the justices that if their discretion was limited to such four grounds, the respondent was entitled to his transfer. The justices, however, were of opinion that there was then no licence in force in respect of the house, inasmuch as it had expired on October 10, 1891, and that the renewal thereof having been refused and the refusal not appealed against the licence had not been granted by way of renewal from time to time so as to entitle the respondent to the benefit of s. 19 of 32 & 33 Vict. c. 27, and s. 7 of 33 & 34 Vict. c. 29 (1), and that

(1) By s. 8 of the Wine and Beer-house Act, 1869 (32 & 33 Vict. c. 29): "No application for a certificate under this Act in respect of a licence to sell by retail, beer, cider, or wine, not to be consumed on the premises, shall be refused except upon one or more of the following grounds, viz.:

"(1.) That the applicant has failed to produce satisfactory evidence of good character.

"(2.) That the house or shop in respect of which a licence is sought, or any adjacent house or shop owned or occupied by the person applying for a licence, is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character.

"(3.) That the applicant having previously held a licence for the sale of wine, spirits, beer, or cider, the same has been forfeited by his misconduct, or that he has through misconduct been at any time previously adjudged disqualified from receiving any such licence or from selling any of the said articles.

"(4.) That the applicant or the house in respect of which he applies, is not duly qualified as by law is required."

By s. 19: "Where, on May 1, 1869, a licence under any of the said recited Acts is in force with respect to any house or shop for the sale by retail therein of beer, cider, or wine, to be

in dealing with the application, they were not limited to the said four grounds of refusal; but were at liberty to exercise their discretion and take into consideration the nature of the neighbourhood and its requirements and the history of the house, and they accordingly refused the application.

The respondent appealed from such refusal to the quarter sessions who granted the transfer of the licence, subject to a case for the opinion of the Court, upon the question whether the licence was in force on November 17, 1891, and had been granted by way of renewal from time to time so as to entitle the respondent to the benefit of s. 19 of 32 & 33 Vict. c. 27, and s. 7 of 33 & 34 Vict. c. 29, and to restrict the justices sitting in transfer sessions on that day to the four grounds of refusal set forth in s. 8 of 32 & 33 Vict. c. 27, or whether they were at liberty in dealing with the respondent's application for the transfer of the licence to him to exercise a general discretion with reference to the granting or refusal thereof.

Joseph Walton, and *E. Sutton*, for the appellant justices. The justices had, no doubt, power to grant the transfer; but, at the same time, they had, under the circumstances of the case, a general discretion whether they would grant it or not, for the licence had, by reason of non-renewal, ceased to exist at the date of the application for the transfer. Sect. 19 of the Wine and Beerhouse Act, 1869, has no application to this case, for that section only applies where the licence "is in force," and has been "granted by way of renewal from time to time." (See the amending section, 33 & 34 Vict. c. 29, s. 7.) In *Hargreaves* v.

consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine, to be consumed on the premises in respect of such house or shop except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine, not to be consumed on the premises, may be refused, in accordance with this Act."

By s. 7 of the Wine and Beerhouse Act Amendment Act, 1870 (33 & 34 Vict. c. 29): "The 19th section of the principal Act shall extend to licences granted by way of renewal from time to time of licences in force on the 1st day of May, 1869, whether such licences continue to be held by the same person or have been, or may be, transferred to any other person or persons."

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Dawson (1) a beerhouse had a licence on May 1, 1869, but owing to the misconduct of the then tenant, renewal of such licence was refused at the general annual licensing meeting in August, 1869. At the succeeding licensing meeting in 1870 a new tenant applied for a licence, and was refused on the ground that there was no necessity for such a house in the neighbourhood. It was held that the justices had a general discretion. In *Reg.* v. *Curzon* (2) it was similarly held that, on the true construction of s. 19, the justices were not prohibited from exercising their discretion in the case of a beerhouse licensed on May 1, 1869, the licence or certificate of which had lapsed before the application for renewal. In *Reg.* v. *Justices of the West Riding* (3), where a licence existing on May 1, 1869, for the sale of beer to be consumed on the premises, was forfeited by the conviction of the holder, under s. 15 of the Licensing Act, 1872, for permitting the premises to be used as a brothel, it was held that the licence was not "in force" within s. 19 of the Act of 1869, and that the licensing justices at special sessions had a general discretion to refuse applications by the landlord and a new tenant of the premises for a transfer of the licence. No distinction is to be drawn for the purposes of s. 19 between a licence which has been forfeited and one which has lapsed in consequence of refusal of renewal; if the former is not "in force," neither is the latter. Sect. 3 of 34 & 35 Vict. c. 88 (4), which was declaratory of the

(1) 24 L. T. (N.S.) 428.

(2) Law Rep. 8 Q. B. 400.

(3) 21 Q. B. D. 258.

(4) By s. 3 of 34 & 35 Vict. c. 88 (repealed by the Licensing Act, 1872): "Whereas under the Wine and Beerhouse Act, 1869, and the Wine and Beerhouse Act Amendment Act, 1870, justices are prohibited, in the case of any house or shop with respect to which a licence for the sale by retail therein of beer, cider, or wine, was in force on the 1st day of May, 1869, from refusing an application for a certificate in respect of such house except upon the grounds therein mentioned, and doubts having arisen whether such prohibition extends to the case of an application for a certificate with respect to any such shop or house, if the licence which was in force on the 1st day of May, 1869, or any certificate since granted in respect of the said house or shop, has by forfeiture, lapse of time, or otherwise ceased to be in force, and it is expedient to remove such doubts. It is therefore hereby declared, that in the case of any such application the justices may, in their discretion, refuse the application on any ground upon which they might refuse the application if made for a certificate with respect to any house or shop with respect to which a licence was not in force on the 1st day of May, 1869."

meaning of s. 19 of the Act of 1869, treated certificates which ceased to be in force by lapse of time or otherwise as standing on the same footing with forfeited certificates. The Act in which that declaratory section was contained has been wholly repealed; but such repeal cannot affect the meaning of s. 19 of the earlier Act.

Poland, Q.C., and *J. M. Yates*, for the respondent. A transfer of the licence of a beerhouse licensed on May 1, 1869, can only be refused, even after the expiration of the licence, on the same grounds as those on which renewal might be refused, provided the application for the transfer be made before the general annual licensing meeting next succeeding the date of the expiration of the licence. The licence which the justices are empowered to "grant"—i.e., transfer—under s. 14 of the Licensing Act, 1828 (9 Geo. 4, c. 61), is not in substance a new licence, but its grant is tantamount to a temporary renewal of the old one. If it were not so, there would be no right of appeal against a refusal to transfer, which there is under s. 27 of that Act. So long as the right to apply for a transfer under s. 14 continues, the old licence, notwithstanding its nominal expiration, remains "in force" within the meaning of s. 19 of the Wine and Beerhouse Act, 1869. The object of s. 14 was to protect the property of the landlord, or other persons mentioned in the section, and for that purpose to provide for the premises being licensed during the interval between the several events therein mentioned and the general annual licensing meeting "then next ensuing." But no longer. When once the "next ensuing" general annual licensing meeting has passed by it is too late to apply for a transfer under that section.

This is the explanation of the cases of *Reg.* v. *Curzon* (1) and *Hargreaves* v. *Dawson*. (2) The reason why the application in those cases was to the general annual licensing meeting, and not to the special transfer sessions, was that the time for applying for a transfer had elapsed. In the former case the licence had lapsed for more than one year, and in the latter for more than three years, before the date of the application. The applicant was consequently in the same position as if he were asking for a

(1) Law Rep. 8 Q. B. 400. (2) 24 L. T. (N.S.) 428.

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new licence. Whereas here the application for the transfer was during the currency of the year next succeeding the expiration of the licence. In *Reg.* v. *Justices of the West Riding* (1), where the licence was forfeited by the conviction of the holder for permitting the premises to be used as a brothel, it was no doubt held not to be "in force," although the application for a transfer was made on the very day of the conviction. But a licence when once forfeited is (except in the cases mentioned in s. 15 of the Licensing Act, 1874 (37 & 38 Vict. c. 49)) in the same position as if it had never existed; whereas a licence which has merely lapsed by reason of refusal of renewal stands on a different footing.

Joseph Walton, in reply.

Jan. 27. POLLOCK, B. The only question which has been submitted by the justices for our opinion is whether the licence of this beerhouse was in force on November 17, 1891, and had been granted by way of renewal from time to time, so as to entitle the respondent to the benefit of s. 19 of the Wine and Beerhouse Act, 1869. Upon that question I am of opinion that our answer ought to be in the affirmative, and consequently the justices were not entitled to refuse the application except upon one or other of the four grounds mentioned in s. 8 of that Act. The application was for a transfer under s. 14 of the Act of Geo. 4, and when one comes to look at the object and intention of that section it seems clear that the time for applying for a transfer extends beyond the period within which the transferred licence would in the ordinary course expire. That it does so was expressly decided in *Reg.* v. *Justices of Liverpool.* (2) And the reason seems to be that the provisions of the section were introduced for the benefit of the landlord, as appears from *Ex parte Todd* (3), where it was held that a second incoming tenant might apply for a transfer, although the first had failed. But if the licence in the present case was in force for the purposes of an application for a transfer under s. 14 of the Act of Geo. 4, it must, in my judgment, equally be in force for the pur-

(1) 21 Q. B. D. 258. (2) 11 Q. B. D. 638.
(3) 3 Q. B. D. 407.

poses of s. 19 of the Act of 1869, so as to regulate the discretion of the justices in dealing with that application.

Three cases were cited before us on behalf of the appellants; but they are, I think, all distinguishable. The first was *Reg.* v. *Curzon* (1), where, the licence having expired in the ordinary course in October, 1869, no attempt was made to renew it until 1872, when the application was refused. Upon a subsequent application in 1873 the Court very properly treated the licence as having wholly expired, and upon that ground consequently they regarded the application as an application for a new licence. The case of *Hargreaves* v. *Dawson* (2) proceeded upon similar grounds. In *Reg.* v. *Justices of the West Riding* (3), where the previous tenant had been convicted of using the premises as a brothel, the Court, no doubt, held that the licence was not "in force" within the meaning of s. 19 of the Act of 1869; but that decision went upon the ground that by s. 15 of the Licensing Act, 1872, a conviction for that offence operates as an absolute forfeiture of the licence. No such effect, however, is produced by a conviction for permitting drunkenness on the premises, the only provision with regard to that offence being that the conviction is to be recorded upon the licence. This appeal must be dismissed.

VAUGHAN WILLIAMS, J. I am of the same opinion. In my judgment, the licence in question, although the year for which it was granted had expired at the time of the application to the justices for a transfer, must be treated as a licence in force within the meaning of s. 19 of the Act of 1869, and therefore the transfer was only refusable on one of the four grounds specified in that Act. The cases which were relied upon by the appellants are, I think, distinguishable from the present case upon the grounds pointed out by my brother Pollock, and I should have added nothing to his judgment were it not for the fact that, in my opinion, the question which is raised upon this case is not the only question which might, and ought to, have been raised upon the facts. The case proceeds upon the assumption that

(1) Law Rep. 8 Q. B. 400. (2) 24 L. T. (N.S.) 428.
(3) 21 Q. B. D. 258.

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an application under s. 14 of 9 Geo. 4, c. 61, could properly be made; but I do not think that we ought to have been invited to assume that. It is, to my mind, extremely doubtful whether on the facts of this case there was any right to make an application under that section at all. That section, by the very terms of it, applies only to cases in which there has occurred in respect of the licensed person one of the matters stated at the commencement of the section. If no one of those matters has occurred the section has no application whatever. Now, the matters mentioned at the beginning of the section are these: "If any person duly licensed shall (before the expiration of such licence) die, or shall be by sickness or other infirmity rendered incapable of keeping an inn, or shall become bankrupt; or if any person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted or shall have neglected to apply at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell excisable liquors by retail, to be drunk or consumed in such house." In all such cases the justices may grant a transfer. But I do not understand that in the present case any one of those events has happened. It is true that Faulkner on October 5 removed from and yielded up possession of the house specified in the licence, and at that date he, no doubt, answered the description of a "person so licensed," for his licence did not expire until October 10. Still I do not think that his removal was a removal of the kind indicated by the section. It seems to me that the section was only intended to apply to cases in which there could not be, or had not been, any application at the general annual licensing meeting for a renewal. And the removal referred to in the section is, in my opinion, a removal prior to the general annual licensing meeting, and one which consequently leads to the application for a renewal not being made. But that was not the case here; for Faulkner did not remove until after he had made his application for a renewal and had been refused. This question has not indeed been argued, and had it been I might possibly have

come to a different conclusion; but I have thought it right to express my opinion upon it. (1)

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Appeal dismissed.

Solicitors for the appellants: *Cobbett, Wheeler, & Cobbett, Manchester.*

Solicitors for the respondent: *Hockin, Raby, & Beckton, Manchester.*

J. F. C.

McKENZIE *v.* DAY.

1893 *Jan.* 14.

Licensing Acts—Offences—"Illegally Dealing in Intoxicating Liquors"—Licensing Act, 1874 (37 & 38 *Vict. c.* 49), *s.* 17.

By s. 17 of the Licensing Act, 1874, power is given to a justice, on being satisfied that intoxicating liquor is being sold by retail, or exposed, or kept for sale on unlicensed premises, to grant a warrant by virtue of which a constable may enter the premises and search for, seize, and remove intoxicating liquor which there is reasonable ground to suppose is kept there for the purpose of unlawful sale; and it is further provided, that "when a constable has entered any premises in pursuance of any such warrant as is mentioned in this section, and has seized and removed such liquor as aforesaid, any person found at the time on the premises shall, until the contrary is proved, be deemed to have been on such premises for the purpose of illegally dealing in intoxicating liquor, and be liable to a penalty not exceeding forty shillings":—

Held, that the expression "illegally dealing" must be taken to include the purchasing as well as the selling of intoxicating liquor upon unlicensed premises, and that a person so purchasing liquor is guilty of an offence under the above section.

CASE stated by the stipendiary magistrate for Cardiff, from which the following facts appeared:—

The respondent had been summoned to answer an information laid by the appellant, the head constable for the borough of Cardiff, charging her with having, on Sunday, October 16, 1892, been found at No. 19, Mary Ann Street, Cardiff, for the purpose of illegally dealing by buying beer at such time as a constable entered the same under a warrant issued under s. 17 of the Licensing Act, 1874, and at which he had seized and wherefrom had removed beer which there was reasonable ground to suppose was on such premises for the purpose of unlawful sale.

(1) See per Blackburn, J., in *Simpkin* v. *Justices of Birmingham*, Law Rep. 7 Q. B. at p. 486.

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By s. 17 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), power is given to a justice of the peace, if satisfied by information on oath that there is reasonable ground to believe that intoxicating liquor is sold by retail, or exposed or kept for sale by retail at any place within his jurisdiction in which such liquor is not authorized to be sold by retail, to grant a warrant by virtue of which a constable may enter the place and search for intoxicating liquor, and seize and remove any intoxicating liquor therein which there is reasonable ground to suppose is in such place for the purpose of unlawful sale, and the vessels containing the liquor; and the section further provides, that "when a constable has entered any premises in pursuance of any such warrant as is mentioned in this section, and has seized and removed such liquor as aforesaid, any person found at the time on the premises shall, until the contrary is proved, be deemed to have been on such premises for the purpose of illegally dealing in intoxicating liquor, and be liable to a penalty not exceeding forty shillings."

It appeared from the evidence that on the day in question, by virtue of a warrant under s. 17, a constable entered the house and found on the premises twelve jugs (seven being pint jugs), three glasses, and one four-and-a-half gallon cask tapped and containing beer, all of which he seized and subsequently removed. One Ellen Riley (who before the present case came on for hearing, but on the same day, had been convicted of selling beer at the time and place above mentioned) was in the same room with the respondent, and as the constable entered was in the act of handing a pint of beer to a man and receiving money therefor. When the constable was collecting the drinking vessels, the respondent, referring to a pint jug she held in her hand, said, "You shall not have this; I have paid for it, and I'll drink it."

The magistrate dismissed the summons, being of opinion that the expression "dealing" in s. 17 meant trading or selling, and that a person who was merely buying intoxicating liquor on unlicensed premises was not "dealing" in it within the meaning of the section.

The question for the opinion of the Court was whether the summons was rightly dismissed on the ground that the presumption of illegal dealing in intoxicating liquor raised against

a person found on unlicensed premises within the meaning of s. 17 of the Licensing Act, 1874, was rebutted by proof of the facts (1.) that such person did not sell, or expose, or keep for sale intoxicating liquor; and (2.) that such person bought and consumed intoxicating liquor.

B. F. Williams, Q.C. (*C. J. Jackson*, with him), for the appellant. The magistrate's decision was wrong. It cannot be contended that the penalty of forty shillings for illegal dealing in intoxicating liquors, imposed by s. 17 of the Act of 1874, is confined to the seller. By s. 3 of the Act of 1872, the offence of selling intoxicating liquors without a licence is dealt with, and a penalty of 50*l.* affixed to the first offence, and by s. 1 of the Act of 1874, the two Acts are to be construed together. Before an article can be dealt in there must be two persons, a buyer and a seller. [He was stopped by the Court.]

Brynmôr Jones, for the respondent. The word "deal" should be strictly construed, and so construed must mean selling or trading in; distributing, not receiving. The section is stringent in its terms, and should not be extended. The beginning of the section shews that the state of circumstances justifying the issue of a search-warrant is that "intoxicating liquor is sold by retail, or exposed, or kept for sale by retail," and the subsequent expression "dealing in" is a draftsman's abbreviation for the longer phrase. The intention of the section is to prevent a failure of justice by reason of the inability of the constable to shew who was the actual seller; anybody found on the premises is to be presumed to be the seller unless he proves the contrary; but it was never intended to create the specific offence of buying beer on unlicensed premises.

Lord Coleridge, C.J. I am of opinion that the decision of the learned magistrate was wrong, and that he ought to have convicted the respondent. He refused to do so on the ground that the expression "illegally dealing," as used in s. 17, does not include buying as well as selling; but to this contention there seem to be many answers. The plain meaning of the word "deal" unquestionably extends to buying as well as selling;

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there must be two parties to what is called a "deal"; a man cannot deal with himself; there must be some one else for him to deal with. One object of the Act of Parliament was to prevent that from going on in private houses which the legislature had made illegal in public-houses, and this section is a very stringent one: it creates a presumption that, where on unlicensed premises a quantity of liquor is found, and a number of persons are collected together, the persons on the premises are illegally dealing in the liquor, unless the contrary is shewn. There can be no doubt that what was being done in the present case was illegal, and that the persons found on the premises were joining in doing an act which cannot be done by one person alone; it is impossible to evade the plain meaning of the section, under which an act which is illegal on the part of the seller is also illegal on that of the buyer. I can entertain no doubt that "illegally dealing" includes both buying and selling; and as the only real ground of the magistrate's decision was that he took a different view of the meaning of that expression, this case must be remitted to him for the purpose of convicting the respondent.

Cave, J. I am of the same opinion.

Case remitted to magistrate.

Solicitors for appellant: *Andrew, Mellor, & Smith, for Town Clerk, Cardiff.*

Solicitors for respondent: *Riddell, Vaisey, & Smith, for Joseph Henry Jones, Cardiff.*

W. J. B.

[IN THE COURT OF APPEAL.]

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ATTORNEY GENERAL *v.* ROBERTSON.

Revenue—Succession Duty—Interests for Life and in Remainder—Acceleration of Succession—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15, 20, 38.

Under a marriage settlement a fund was vested in trustees in trust for the wife for life, with remainder to the husband for life, with remainder, in default of issue, to the wife absolutely, if she survived the intended coverture. There was no issue of the marriage, and the wife survived the husband :—

Held (affirming the judgment of a Divisional Court), that upon the death of the husband a succession was taken by the wife, in respect of which succession duty was then payable on the amount of the fund, less the value of her life interest therein.

APPEAL from judgment of the Queen's Bench Division upon an information by the Attorney General claiming succession duty.

The facts, which are fully set out in the report of the case in the Court below (1), may be briefly stated as follows :—

Under a marriage settlement, made in 1872, a fund settled by the wife's father was vested in trustees on trust to pay the income thereof to the wife during her life, for her separate use during coverture, without power of anticipation ; and after her decease to pay the said income to the husband, if he should survive her, during his life ; and after the determination of the trusts declared concerning the said income, upon certain trusts thereinafter declared for the benefit of the issue of the marriage ; and, in default of such issue, in whom the trust funds should become absolutely vested, then upon such trusts as the wife should by her will, whether covert or sole, appoint ; and in default of such appointment, in trust for the wife, if she should survive her intended coverture, but if she should die during it, then for the person or persons who, under the statutes of distributions, would have been entitled to the fund, if she had died possessed thereof intestate and without having been married.

The husband died on February 8, 1880, leaving the wife surviving him. There was no issue of the marriage. The wife died on July 24, 1889, having by her will appointed the

(1) [1892] 2 Q. B. 694.

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defendant her executor. On the death of her husband the wife became absolutely entitled to the trust funds. They were accordingly transferred to her by the trustees of the settlement, and were part of her estate at her death; and the defendant had administered the same accordingly.

Probate duty at 3 per cent. and legacy duty at 3 per cent. had been paid upon the amount of the fund.

The informant claimed a declaration that upon the death of the husband succession duty became payable on the capital of the trust funds comprised in the settlement, less the value at the time of his death of the life interest of the wife in such funds; and that the defendant, as executor of the wife, was personally accountable to the Crown for such duty.

The Divisional Court (Wright and Collins, JJ.) gave judgment for the Crown. (1)

(1) By the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally, or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

By s. 15: . . . . "and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

By s. 20: "The duty imposed by this Act shall be paid at the time when the successor, or any person in his right or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof; except that, if there shall be any prior charge, estate, or interest not created by the successor himself upon or in the succession, by reason whereof the successor shall not be presently entitled to the full enjoyment or value thereof, the duty in respect of the increased value accruing upon the determination of such charge, estate, or interest, shall, if not previously paid, compounded for, or commuted, be paid at the time of such determination, &c."

By s. 38: "Where any successor upon taking a succession shall be

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Crackanthorpe, Q.C., and *Ingle Joyce*, for the defendant. The question here is whether a succession was conferred on the wife on the death of the husband, upon which duty was then payable. The defendant's contention is that no succession duty could become payable till the death of the wife; and, that being so, no duty is now payable, because the payment of the probate duty and legacy duty at 3 per cent. exempts the estate from succession duty which would be chargeable here at 1 per cent. (1) It is contended that there was no succession conferred on the wife on the death of the husband.

Assuming that there was a succession within s. 2 of the Succession Duty Act, 1853, it is submitted that no succession duty was payable upon the husband's death by reason of s. 20. There was not a succession to which the wife then became entitled in possession. What she succeeded to was a reversionary interest, of which she did not come into possession till after the determination of her life interest. What the wife got by reason of her husband's death was merely that her reversionary interest expectant upon the determination of her own life estate became absolute, instead of being subject to contingencies as it was before. The interests under the settlement being equitable, there was no merger of the wife's life interest. She was not entitled to immediate possession of the fund on her husband's death. She was not entitled to require a transfer of the fund from the trustees upon her husband's death, although they did in fact transfer it to her, because the succession duty would be a charge upon the fund, and the trustees could decline to transfer unless that was provided for. The wife cannot possibly be considered as having succeeded to the whole fund in possession upon her husband's death. She already had part of the total interest in

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bound to relinquish or be deprived of any other property, the commissioners shall, upon the computation of the assessable value of his succession, make such an allowance to him as may be just in respect of the value of such property."

(1) See the authorities cited on this point on the argument in the Court below ([1892] 2 Q. B. 698). It will be observed that the question whether this contention was right or not did not ultimately arise, as the Court held that succession duty was payable on the death of the husband.

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it, viz., the life interest, which remained an independent marketable integer. All she can be considered as having got by the husband's death is an absolute reversionary interest expectant upon her own death. She cannot, therefore, be considered as having succeeded upon the husband's death to an interest in possession. Suppose the wife had sold her life interest before the death of the husband. The husband had an interest contingent both in form and in nature, and all that happened on his death was that it then failed, whereby her reversionary interest became absolute. How can she be said to succeed on his death to her own life interest? This being a succession to a reversionary interest, under s. 20 that interest must come into possession before the duty can become payable. The succession did not come into possession till the wife's death. The scope of the Act is to tax the accession of benefit caused by the death. That accession here was merely the alteration of the reversionary interest which the wife previously had into an absolute one. That accession of benefit cannot be said to take effect in possession till the wife's death. What the Crown practically claims to value as liable to succession duty is the capital of the fund less the life interest. What is that but valuing a reversion? The Crown really seeks to make the defendant liable for payment on the value in 1880 of a sum to come into possession in 1889, which is contrary to the provisions of s. 20. There is no machinery for making such a valuation as the Crown requires. Sect. 38 of the Act is not applicable, because that section only applies where a person gives up or is deprived of one property on getting another. There is nothing of that sort here. The wife is not deprived of her life interest on the husband's death. She receives the income as before.

Again, assuming a merger of the wife's life interest, and that duty would be payable on the husband's death, so far as s. 20 is concerned, this case comes within the concluding words of s. 15 of the Succession Duty Act, which are quite general, and are not confined to the cases mentioned in the previous part of the section. There has been an acceleration of the wife's succession by extinction of the husband's interest; and, that being so, by the terms of the section the duty is payable at the same time as

if no such acceleration had taken place—that is to say, on the death of the wife.

[They cited *Attorney General* v. *Noyes* (1); *Ex parte Sitwell*. (2)]

Sir *J. Rigby, S.G.*, and *Vaughan Hawkins*, for the Crown. It has been over and over again held, that in construing the Succession Duty Act the substance of things and the popular meaning of words must be looked to rather than the technicalities of conveyancing law or of equity with regard to such matters as the merger of estates. This is shewn by the fact that the Act applies to Scotland, where the conveyancing forms in use are different altogether from those in use in England: see *Lord Braybrooke* v. *Attorney General*. (3) Looking at the substance of the thing, it is correct to say that the result of this settlement or disposition was that, if the wife survived the husband and there was no issue of the marriage, the wife was upon the husband's death to get the property absolutely for herself. In the popular sense of words, the wife was not entitled to the property before her husband's death; afterwards she was entitled to it. Clearly there was upon the death of the husband a succession to something. The wife then had something which she had not before. She could dispose of the whole of the property in præsenti. She got upon the husband's death the actual property in the fund. Before she could not touch a penny of it. She had only a right to the income. This succession of the wife upon the husband's death was a succession in possession within the meaning of s. 20. What the wife came into by the death of the husband, she came into immediately on his death. Her possession was not postponed by any intervening interest in another person. The argument that she was not entitled in possession, because the duty was a charge on the fund in the hands of the trustees, proves too much; because, if no one is entitled in possession to trust funds within the meaning of the Act till the duty is paid, then all cases of trust funds are excluded from the Act. It became on the death of the husband the duty of the trustees to transfer the fund to the wife, reserving the amount of the duty. With regard to the argument for the defendant on s. 38, it may

(1) 8 Q. B. D. 125. (2) 21 Q. B. D. 466.
(3) 9 H. L. C. 150.

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be that it was not intended to apply to such cases as this, and the Crown ought in such cases to have the duty on the full value of the capital, without making any allowance in respect of the life interest; but s. 38 has been so construed with regard to realty that the Crown have submitted to make such an allowance in the case of personalty as well as that of realty: see Hanson on Probate, Legacy, and Succession Duties (3rd ed. p. 326), and *Lord Braybrooke* v. *Attorney-General*. (1) The suggestion that the wife might have assigned her life interest in the lifetime of the husband has no bearing on the case. It is quite clear that, where according to the terms of a disposition of property there would be a succession in possession upon a death, the successor cannot alter the effect by parcelling out the property by alienation. The scope of the Act is plain. Where by virtue of the provisions of a disposition a person in fact comes into possession of an interest upon a death, there succession duty is payable.

The case is not within the concluding part of s. 15 of the Act. There is no acceleration here by reason of the extinction of a prior interest. A succession cannot be said to be accelerated when it takes effect exactly at the time when by the terms of the settlement it was intended to do so. Sect. 15 refers to acceleration by some novus actus interveniens, dehors the terms of the disposition, such as surrender, by which the succession comes into effect before it was intended by such disposition to do so.

Crackanthorpe, Q.C., in reply.

LORD ESHER, M.R. Notwithstanding the ingenious arguments of the counsel for the defendant, I am of opinion that this appeal must be dismissed. We are called upon to construe the Succession Duty Act as applicable to the facts of this case. For that purpose, it is necessary to consider when the Act becomes applicable, and to what. It is clear that the Act is not applicable until the moment when the succession takes effect; and it is also well settled that the Act must be construed with regard to the real substance of the facts at that moment, not to any description of them according to the forms of conveyancing

(1) 9 H. L. C. 150.

law. The point of time to which in this case we have to look is the moment of the husband's death; and we have to consider what the law as applied to the terms of the settlement, or, in other words, what the settlement, according to its legal effect, in fact gave to the wife at that moment. It is plain that in fact it then gave her the difference between the interest which she had under it the moment before his death and the interest which she took under it the moment after his death. That difference is what she succeeded to upon his death. Therefore, we have to see what, under the settlement, she had the moment before the husband's death and what she took the moment after it. At the moment before his death she was entitled in the present only to the income of the fund settled, though she had a future interest subject to the contingency of her husband's life. The moment after his death she had an absolute right to the entire enjoyment and possession of the fund, to do what she liked with it. Therefore, what she got on his death was the difference in value between a mere life interest in the income of the fund and the capital of the fund itself. It was argued that what she succeeded to must be regarded as being a reversionary interest or an interest by way of remainder. Now, is that so in substance? I do not think that it is. There was no person other than the wife who was entitled to any interest in the fund after the husband's death, and until whose death she would not be entitled to the complete possession and enjoyment of it. Hers was not a postponed enjoyment, as in the case of a reversion or remainder expectant upon some one else's death. It was a right in actual possession—a right to the immediate possession of the fund by virtue of the settlement. It is clear that, in considering the application of the Succession Duty Act, we must look at what the law as applied to the terms of a settlement would give upon the occurring of the death and the arising of the succession, if no act had been done by the party who is the successor: so that the suggestion of the defendant's counsel, that the wife might have sold her life interest during the life of the husband may be discarded as having no bearing on the case. If she had done so, it would have had no effect whatever on the rights of the Crown. The question must be considered as if, when the

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death of the husband took place, she had done nothing whatever. On his death she became entitled by virtue of the terms of the settlement to the absolute property in and right of disposition of the fund. She, therefore, got upon his death the difference between the value of her previous life interest and that of the fund considered as absolutely her own. That being so, it appears to me that she became beneficially entitled to property upon the death of her husband by reason of a disposition of property within the meaning of s. 2 of the Succession Duty Act, and there was, therefore, a "succession" within the meaning of that section. Then, if that be so, is there anything in s. 20 to prevent duty from being then payable upon such succession? As I have said, the wife did not upon the husband's death come into an interest expectant upon the life of some other person having a prior interest; she became the only person interested in the fund, and she had an immediate interest. I cannot adopt the view that she was not entitled to immediate possession within the meaning of the Act, because the duty must be provided for before the fund could properly be handed over by the trustees. The Act provides that the duty shall not be payable until the successor becomes entitled in possession; and, when he or she becomes so entitled, at that moment the duty becomes payable. I think that on the death of the husband the wife did become entitled to immediate possession of the fund, there being no prior interest of any other person under the settlement in existence, so that all the trustees had to do was to transfer the fund. The fact that they would have a right to reserve the amount of the duty upon transferring the fund does not appear to me to prevent the wife from becoming entitled in possession. Therefore it seems to me clear, that upon the death of the husband the wife became entitled to a succession within the meaning of s. 2, upon which duty was payable; that she was entitled to such succession in possession within the meaning of s. 20; and, therefore, that according to those sections the Crown was at that time entitled to duty. Then what other provisions of this Act are applicable? I think, considering the fact that the wife really only got on the husband's death the difference between the value of the fund and the life interest she previously

had, s. 38 applies to the case, not by way of indulgence, as suggested, but in terms. Therefore the duty must be computed according to the mode of valuation prescribed by that section. Then, is the payment of the duty postponed by s. 15? I cannot see that there has in this case been any acceleration of the succession by extinction of a prior interest. By the terms of the settlement the wife was not to become entitled to what she has succeeded to, viz., the difference of value I have mentioned, until the husband's death. She came into that succession at the very time originally fixed by the settlement. Nothing is accelerated or extinguished. Therefore, it seems to me that s. 15 does not apply to this case. For these reasons I think the judgment must be affirmed.

LINDLEY, L.J. The argument of the Solicitor General has convinced me that the judgment of the Court below was right. The key to the construction of the Act is to be found in the interpretation to be put on the word "succession." It is to the ambiguity of that expression that most of the difficulties which have arisen in the application of the Act are due. The term "succession," as used in the Act, appears to be really equivalent to property chargeable with duty, of whatever it may consist, but it also includes an increase of benefit, as is shewn by several sections, particularly ss. 5 and 7. In order to see whether the wife succeeded to anything on the death of the husband, and if so to what, we must first consider the state of things existing before his death. What at that time had she and what had she not got under the settlement? She had then a right to the income of the fund in settlement without power of anticipation; and, in default of issue, she had a power of disposing of the fund by will. She had not got the power to dispose of the fund as a sum in possession. We must then consider whether, upon his death, she got under the settlement something which she previously had not got, and if so, what it was. She then lost her life interest, and she got what she had not before, viz., the whole property in the fund, and power to dispose of it as she liked then and there. That appears to me to be a succession within the Act; and, upon that view of the

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meaning of the term "succession," which appears to me to be the correct one, I do not see that the terms of s. 20 raise any difficulty in the way of our holding that succession duty is payable on the death of the husband. The difficulty I did feel arose from the terms of s. 15. But that difficulty has been got rid of by the argument of the Solicitor General. On looking more closely at the terms of s. 15, the difficulty is not so great as I at first thought. The language of the section is, "where the title to any succession has been accelerated by the surrender or extinction of any prior interests." Here the wife's title to the succession was not accelerated by the death of the husband, though her possession was. For these reasons I agree that the appeal must be dismissed.

LOPES, L.J. I am of the same opinion. The critical time for the purposes of this case is the moment of the death of the husband. Under this settlement a fund was settled upon trust to pay the income of it to the wife for her life, with remainder to the husband for his life, with remainder, in default of issue, to the wife absolutely if she survived the husband. In popular language, the effect of the settlement was that, if the wife survived the husband, she was to have the property absolutely. The question that arises is, whether in the events that have happened she became entitled under the settlement, upon the death of her husband, to anything in possession. To determine that question it is necessary to see what she had under the settlement before and after the husband's death. Before his death, she had in the present only the income of the trust fund, and could not deal with the capital in any way. After his death she had the beneficial interest in the capital, and power to dispose of it absolutely. So that upon the death of the husband she became, in accordance with the terms of the settlement, entitled in possession to something to which she was not entitled before. In the words of s. 2 of the Act, she became, by reason of a disposition of property, beneficially entitled to property immediately upon his death. So far, therefore, it appears to me that the contention for the Crown is correct. But there remains the question under the concluding portion of s. 15. I did at first feel a difficulty with regard to the terms of that

section; but the argument of the Solicitor General has removed that difficulty. Upon a careful consideration of the words of the section, I think that, on the true reading of it, there is no acceleration of a succession, within its meaning, where the succession comes to the successor at the moment at which it was intended by the settlement to come to him. I think that the words of the section refer to something outside the settlement, which has caused the acceleration of the succession by causing it to take effect before the time intended by the parties by whom the settlement was made. For these reasons I also think that the appeal should be dismissed.

Appeal dismissed.

Solicitor for Crown: *Solicitor to Inland Revenue.*

Solicitor for defendant: *Meredith, Roberts, & Mills, for Birch, Cullimore, & Douglas, Chester.*

E. L.

[IN THE COURT OF APPEAL.]

SIMON, ISRAEL & CO. *v.* SEDGWICK.

Insurance, Marine—Voyage—Commencement of Risk—Land Transit—Deviation Clause—Alteration.

The plaintiffs, merchants at Bradford, effected an open policy of insurance with the defendants on merchandise, "as interest may appear or be hereafter declared," from the Mersey or London, to any port in Spain this side of Gibraltar, and thence by inland conveyance to any place in the interior of Spain. There was a marginal note providing that deviation or change of voyage, not included in the policy, was to be held covered at a premium to be arranged. The plaintiffs dispatched goods from Bradford to Madrid, expecting that they would be carried, as former consignments had been, to Seville, on this side of Gibraltar, and thence to Madrid; but they were, in fact, shipped on a vessel bound from Liverpool to Carthagena and other ports beyond Gibraltar, and the bills of lading were made out to Carthagena. The plaintiffs declared the goods under the policy, and told the insurance broker that the goods were going to Seville. The ship was lost before she touched at any port in Spain:—

Held, affirming the decision of Wright, J., that the risk had never attached, for the voyage to Carthagena was not one of the voyages covered by the policy, and that the defendants were not liable.

ACTION by the plaintiffs, a firm of merchants at Bradford, against the defendants, the underwriters, on a policy of insurance of goods lost on a voyage from Liverpool to Spain.

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At the trial before Wright, J., at the Leeds Assizes, it appeared that the policy was an open policy, dated February 18, 1891, made in the name of Messrs. Bischoff & Sons, insurance brokers, who acted as brokers for the plaintiffs. It was expressed to be upon all merchandise "as interest may appear or be hereafter declared." The risk insured against was stated as follows: "Lost or not lost, at and from the Mersey $\frac{\text{and}}{\text{or}}$ London, both or either to any port or ports in Portugal $\frac{\text{and}}{\text{or}}$ Spain, this side Gibraltar, $\frac{\text{and}}{\text{or}}$ at or from thence by any inland conveyance, to any place or places in the interior, including all risks by rail or steamer between Lisbon and Oporto, and including all risks by any conveyance whatever, from the time of leaving the warehouse in the United Kingdom until on board, in craft to and from vessel or vessels, of lighters on the river or elsewhere, of fire whilst waiting shipment in docks, warehouses, hulks, or elsewhere, $\frac{\text{and}}{\text{or}}$ in transit, of transhipment, of steam navigation, and all risks of every kind until safely delivered at the warehouse of the consignees, including all liberties as per bills of lading," with liberty for the said ship to touch at any port or ports whatsoever for any purposes necessary or otherwise. There was a marginal note in these terms: "Deviation $\frac{\text{and}}{\text{or}}$ change of voyage $\frac{\text{and}}{\text{or}}$ transhipment, not included in this policy, to be held covered at a premium to be arranged."

The losses incurred by the plaintiffs were in respect of certain goods sent from Bradford to Madrid. On former occasions goods consigned by the plaintiffs to Madrid had been shipped at Liverpool to Seville, and thence carried by rail to Madrid. The plaintiffs intended the same course to be followed in this case, and supposed that it would be followed; and on March 2, 1891, they instructed their insurance brokers to declare the goods on the above-mentioned policy, informing them that the goods were going from Liverpool to Madrid viâ Seville. On March 7 they ascertained that the goods would go by the ship *Lope de Vega*, and on the 10th they had the name of that ship inserted in the declaration. The ship cleared from Liverpool on March 6, and was never heard of again, and was lost, with all her cargo, between that port and the west coast of Spain. When the ship was reported as missing the plaintiffs discovered, for the first time, that the *Lope de Vega* was not bound to Seville at all,

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but to Carril and Huelva, on the west coast of Spain, and to Carthagena and other ports on the east coast; and that the bills of lading of the goods insured by the plaintiffs had been made out for Carthagena. The plaintiffs immediately informed the underwriters of the mistake that had been made, and tendered the proper extra premium for Carthagena; but the offer was refused, not on the ground of the insufficiency of amount, but on the ground that the voyage to Carthagena was not one of the voyages covered by the policy. The plaintiffs accordingly brought the present action against the underwriters, seeking to recover 425*l.* under the policy. The learned judge gave judgment for the defendants, holding that the policy never attached to the goods in question. From this judgment the plaintiffs appealed.

Cohen, Q.C., and *English Harrison*, for the plaintiffs. The policy attached directly the goods left Bradford. The land transit was part of the voyage insured against, and there was no change of the terminus ad quem, which was Madrid. There was, therefore, no alteration in the voyage; nor was there any deviation, although an alteration or deviation was allowed under the terms of the marginal note, because the ship was lost before she arrived at any port in Spain. It is proved in the evidence that when the goods were sent off from Bradford the plaintiffs intended that they should go to Madrid by Seville or some other port on the west coast of Spain; that was the voyage insured, and that was the voyage on which the ship was lost: *Rodocanachi* v. *Elliott.* (1)

Joseph Walton, Q.C., and *J. A. Hamilton*, for the defendants. The insurance was a marine insurance, and did not attach to any goods which were to be sent by sea to any port beyond Gibraltar. It may be true that the plaintiffs expected that the goods would be taken to Seville; but there is no evidence that they gave any special instructions to that effect. The port of discharge was the terminus ad quem of the voyage, and was the essential part of the contract; the land transit was only a supplement to the voyage. Therefore, the policy did not attach at

(1) Law Rep. 8 C. P. 649.

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Bradford, nor could it attach to any goods that were not going to a port on the west coast of Spain.

Cohen, Q.C., in reply.

LINDLEY, L.J., after reading the material parts of the policy as before stated, continued:—Now, the real question which we have to consider is this, whether this policy ever did, or whether it never did, attach to goods sent by the persons for whom this policy was effected from Bradford, under the circumstances which I will mention. These goods were intended by the plaintiffs to go to Madrid; and I think the correspondence shews they were intended to go by the mode in which similar goods had gone before, that is to say, viâ Liverpool and Seville. Unfortunately, these goods were not shipped from Liverpool to any port west of Gibraltar; but, by a blunder, I suppose, they were shipped to a port east of Gibraltar, namely, Carthagena—one of the places to which the ship was going. That port was not a port such as is described in the words which I have read, that is to say, it is not a port in Portugal or Spain "this side Gibraltar." It is true that they were lost this side Gibraltar, but they were on their way to a port beyond Gibraltar. The ship was going first to Carril, and then to a port in the south, which would be the place for discharging the goods if they were going to Seville, and then the ship was going on through the Straits of Gibraltar to Carthagena and other places. The plaintiffs say, that, upon the true construction of this policy, this is a policy from Bradford to Madrid. If it is, then I think it is not denied by their opponents that the underwriters would be liable. But it is contended that this is not a policy from Bradford to Madrid; and, on consideration, I have come to the conclusion that the view of the underwriters is right. We must ask ourselves what is the voyage that includes the risks to which I have alluded—the risks printed in type? It is an insurance from the Mersey to some port in Spain this side of Gibraltar; and unless these goods were insured for that voyage, there is nothing which brings in this extra risk from deviation. The starting point is that the goods were insured from Liverpool to some place this side of Gibraltar. They never were on that voyage; and,

that being the case, you cannot extend the policy to cover the risks not included in the voyage for which these goods were insured. That appears to me to be the short answer, and the conclusive answer, to the plaintiffs' argument. In other words, this policy is not a policy from Bradford to Madrid; and the plaintiffs are unable, by reason of the blunder which has been committed, to bring themselves within the risks which are included in a voyage for which these goods were insured. I think the view taken by the learned judge is right, and that this policy never attached, and, that being so, the memorandum about deviation, or change of voyage, does not affect the question.

BOWEN, L.J. I am entirely of the same opinion. The real fate of the appeal depends upon the answer we give to the question, whether this policy ever attached. Now, if we take the policy and construe it, it seems to me that its meaning becomes tolerably clear. We start with this, that the policy is a marine policy to begin with—a land journey being superadded to it, but forming part of the journey which the goods are to make, and the duration of the risk becomes applicable accordingly to the entire journey.

The first thing we have to do is to discover what the voyage or journey is which is to be insured, in order to see to what voyage or journey the duration of the risk is applicable, before we can consider what risks are included by enumeration under the policy. The voyage is a distinct thing altogether from the enumeration of the risks. The voyage here seems to me to be fixed by words which it is impossible to extend, and which it is impossible to misunderstand. It begins, "At and from the Mersey $\frac{\text{and}}{\text{or}}$ London, both or either, to any port or ports in Portugal $\frac{\text{and}}{\text{or}}$ Spain, this side Gibraltar." So much as to the words which define the initial marine transit, to which is superadded the land transit, "$\frac{\text{and}}{\text{or}}$ at or from thence by any inland conveyances to any place or places in the interior, including all risks by rail $\frac{\text{and}}{\text{or}}$ steamer between Lisbon and Oporto." It seems to me, that the terminus with which the voyage or journey begins is "the Mersey $\frac{\text{and}}{\text{or}}$ London, both or either." Then there is a terminus with which the marine transit is to end, which is an essential

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part of the definition of this journey, "to any port or ports in Portugal and or Spain, this side Gibraltar." Again, there is a further terminus, which is fixed for the land journey, which is superadded, "any place or places in the interior."

Now the policy remains to a great extent a marine policy. It is not a marine policy which ends as soon as the sea is crossed, but a marine policy to which is superadded a land transit during which the goods are to be protected. But the marine voyage is defined as clearly as a voyage can be defined. We all know by this time the general history of the extension of the protection which the policy provides for the goods by the enumeration of risks slightly outside the transit. It has been by slow growth that risks outside the sea journey have been swept, so to speak, within the shelter of the policy. But in construing the whole of the obligations and protections which the policy creates, you must first get distinctly in your mind the definition of the voyage, and then apply the definition of the voyage to the enumeration of the risks. In the present case the goods started from Bradford, and it has been contended that the moment they started from Bradford they were upon the insured voyage. If the goods had started for the insured voyage, it seems to me the risk during the time that they were between Bradford and Liverpool would have been covered as incidental to and supplementary to the insured voyage. But we have here a conclusive fact that the goods never started upon the insured voyage. Accordingly, the risk between Bradford and Liverpool never could be incidental or supplementary to it. It is not necessary to decide what would have been the case supposing the goods, after having been specifically appropriated by a contract of carriage to the insured voyage, had been injured or lost during the transit between Bradford and Liverpool. It is not necessary to decide that case. In this case the facts here shew conclusively that the goods were never specifically appropriated to the insured voyage, because the person who had the control of the goods—the person who had the power of fixing the voyage on which the goods were ultimately to go—fixed the voyage outside the policy; and if that is so, the policy never attached, and it follows that the deviation and change of voyage cannot affect it.

Now, it has been said that this is a technical point. The particular case certainly seems a hard case. But it is a most important point of business. I cannot conceive a more important point, nor can I conceive one which might lead to more mischief than might follow if we were to loosely construe this contract in order to assist a particular owner of goods. We cannot do that when we are dealing with an insurance contract. Men of business depend upon a correct interpretation of the law, and we shall be adopting a course which in the long run is more conformable to justice and fair dealing if we keep it to its channel than if we in any particular case stretch the law in order to protect a particular plaintiff.

A. L. SMITH, L.J. This is an action brought upon a Lloyd's policy to recover for a total loss of goods at sea. The defence is, that the goods never were upon the voyage insured, and so were never covered by the policy—in other words, that the policy never attached. That is the issue. My brother Wright has held that the defendants are right, and although at first sight this does appear, considering the facts of the case, a somewhat technical defence, I quite agree with what has fallen from Bowen, L.J., that that does not make it any less incumbent upon us to put the true construction upon this policy. Now, a good deal of this policy is in the old form, and the point to ascertain, first of all, is what is the voyage covered by the policy, in order to ascertain whether the policy attaches to the goods in question. This policy begins by stating that the plaintiffs are insured at and from the Mersey to the west coast of Spain, this side of Gibraltar, and at and from the west coast of Spain to any places in the interior of Spain. Now, that is the voyage which is contemplated in this policy—at and from the Mersey (leaving out London) to the west coast of Spain, and from the west coast of Spain to the interior of Spain. Then how does the policy go on? When you get what the voyage is, then come the risks which are to be included in that voyage; and, as I read this policy, when you once get the goods upon the voyage in question, then the risk which the underwriter undertakes is the risk from the warehouse to the ship in this country, during the voyage, and from the ship

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to the warehouse in the other country. But unless you get the goods started upon or allocated by contract, as Bowen, L.J., says—and I adopt that phrase—to the insured voyage, in my judgment this policy does not attach. It is said that this policy attached, no matter on what voyage the goods ultimately might go, immediately they started from Bradford. I do not read the policy in that way at all. Until you get the goods upon the contemplated voyage, in my judgment this policy does not attach, and it is a mistake to say that this policy is at and from Bradford to the west coast of Spain. It is at and from the Mersey to the west coast of Spain; and when you get the goods upon that voyage, then it is that the risk attaches to the goods between Bradford and the Mersey. It seems to me that until this policy attached—and this is conceded on both sides—this marginal note about deviation and change of voyage does not apply at all. In my opinion, my brother Wright was right when he held that the underwriters' defence was correct, in saying that these goods never were at risk upon the insured voyage, and that, therefore, the policy never attached.

Appeal dismissed.

Solicitors for plaintiffs: *Botterell & Roche.*
Solicitors for defendants: *Walton, Johnson, & Bubb.*

M. W.

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[IN THE COURT OF APPEAL.]

CORN AND ANOTHER, APPELLANTS; MATTHEWS AND ANOTHER, RESPONDENTS.

Infant—Apprenticeship Deed—Contract not for Benefit of Infant—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *ss.* 5, 6.

An infant was apprenticed by a deed containing a provision that the masters should not be liable to pay wages to the apprentice so long as their business should be interrupted or impeded by or in consequence of any turn-out, and that the apprentice might during any such turn-out, and for such reasonable time thereafter as might be necessary for him to enable him to determine such employment as thereinafter mentioned, employ himself in any other manner or with any other person for his own benefit, and that in case the apprentice

should elect so to employ himself the masters should not, during the time he should so employ himself, be bound to teach or instruct him :—

Held, that this provision was so much to the detriment of the infant that the apprenticeship deed could not be enforced against him under the Employers and Workmen Act, 1875, ss. 5, 6.

Meakin v. *Morris* (12 Q. B. D. 352) approved.

APPEAL from a judgment of the Queen's Bench Division on a case stated by the stipendiary magistrate for the district of the Staffordshire Potteries.

The appellants were manufacturers of earthenware, carrying on business at Longport Staffordshire Potteries; the respondent Herbert Matthews, the younger, was an infant apprentice in their service; and the respondent Herbert Matthews, the elder, was his father.

The appellants caused the respondents to be summoned to answer the following complaint under 38 & 39 Vict. c. 90 :—

"The complainants' claim is for an order directing the defendants to perform the conditions and agreements contained in an indenture of apprenticeship, dated the 12th day of September, 1890, and made between the defendant Herbert Matthews, the younger, of the first part, the defendant Herbert Matthews, the elder, of the second part, and the complainants of the third part, the said defendant Herbert Matthews, the younger, having neglected his work from the 4th day of May last to the date of these particulars—8th June, 1892."

At the hearing of the complaint the appellants put in evidence and proved the indenture aforesaid, by which the apprentice was bound to the appellants to learn that branch of a potter's art or business called potter's printing, for the term of five years (excepting the usual holidays and days on which the branch of the business of the masters should be at a standstill through accident beyond the control of the masters).

The deed contained a covenant "that they the masters shall and will during the said term (excepting and subject as aforesaid) teach and instruct the apprentice, or cause him to be taught and instructed, in the said branch of the potter's art or business called potter's printing, in the best manner they can, and find the apprentice fair and reasonable work, and pay the apprentice for his work and services such wages as are hereinafter mentioned,

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that is to say, seven and threepence halfpenny per score dozens of printer's counts, provided always that the masters shall not be liable or called upon to pay any wages to the appentice so long as their business shall or may be interrupted or impeded by or in consequence of any 'turn out,' and the apprentice is hereby expressly authorized and allowed during any such 'turn out,' and for such reasonable time thereafter as may be necessary to enable him to determine such employment as hereinafter mentioned, to employ himself in any other manner or with any other person for his own benefit, and in case the apprentice shall elect so to employ himself, the masters shall not, during the time he so employs himself, be bound to teach and instruct the apprentice, or cause him to be taught and instructed as aforesaid."

It was proved that the respondent Herbert Matthews, the younger, worked as an apprentice under the indenture from the date thereof until April 19, 1892, and also that on May 4, 1892, he absented himself from work, and remained absent thereafter.

An objection was taken for the respondents that the indenture was invalid for want of mutuality and for containing a provision disadvantageous to the respondent apprentice, he being an infant, and the case of *Meakin* v. *Morris* (1) was cited in support of the objection. It was contended on the part of the appellants that the indenture was not void for want of mutuality, and that the stipulations therein were fair and reasonable, and such as were common to labour contracts in this district, and were just to both parties; that the terms of the indenture materially differed from those of the indentures in *Reg.* v. *Lord* (2), and *Meakin* v. *Morris* (1); and that the provision for stoppage of wages of the appentice so long as the master's business should or might be interrupted by or in consequence of any turn-out was rendered fair and just by the subsequent clause expressly authorizing and allowing the apprentice during any turn-out to employ himself in any other manner or with any other person for his own benefit, and, further, that the covenant of the master to teach the apprentice notwithstanding turn-outs, and during the continuance of the same, effected a sufficient mutuality of contract.

The magistrate decided that if the indenture was valid there

(1) 12 Q. B. D. 352. (2) 12 Q. B. 757; 17 L. J. (M.C.) 181.

was sufficient evidence to justify him in ordering the respondent apprentice to return and fulfil his contract; but he determined that it was invalid, and dismissed the summons.

The Divisional Court, on the authority of *Meakin* v. *Morris* (1), gave judgment for the respondents.

The appellants appealed.

Boddam, in support of the appeal. The decision in *Meakin* v. *Morris* (1) would seem to go to this length, that if any provision in the apprenticeship deed is not for the benefit of the infant the deed is invalidated thereby. The rule which it is submitted should be adopted is, that if the deed on the whole is for the benefit of the infant it should be supported. It may be that a particular clause would so affect the whole deed as to render it unfair to the apprentice; but that is not the case here, for in the case of a turn-out, which it is admitted may mean a lock-out by the master, the master undertakes to continue the instruction of the apprentice. Such instruction is the important part of the duty undertaken by the master, and this the master is willing to continue during a turn-out, though he is not willing to pay wages during that time when he is himself earning nothing. If the apprentice prefers that the instruction should not continue unless he is paid for his work, he is at liberty to obtain work elsewhere. This willingness of the master to continue the instruction distinguishes the case from *Reg.* v. *Lord.* (2) [He also cited *Leslie* v. *Fitzpatrick* (3); *Cooper* v. *Simmons* (4); and *De Francesco* v. *Barnum.* (5)]

Stampa Lambert, contrà. The provision is not for the benefit of the apprentice. By locking out their men the masters can deprive the apprentice of his means of livelihood, and the provision that he may, if he can, find work elsewhere is illusory. The case comes within the principles laid down in *Reg.* v. *Lord* (2) and *Meakin* v. *Morris* (1), and it is submitted that the latter case, which governs the present, was correctly decided and should not be overruled.

(1) 12 Q. B. D. 352.
(2) 12 Q. B. 757; 17 L. J. (M.C.) 181.
(3) 3 Q. B. D. 229.
(4) 7 H. & N. 707; 31 L. J. (M.C.) 138.
(5) 45 Ch. D. 430.

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LORD ESHER, M.R. It seems to me that the judgment of Fry, L.J. (1), is one with which one would agree, and, although it makes the major premise larger than it had been previously enunciated in such cases, it does not alter the law applicable to them. Now, as I understand the rule laid down by Fry, L.J., it is this: The mere fact of some conditions in the deed being against the apprentice does not enable the Court on that ground only to say that the agreement is void. It is impossible to frame a deed, as between a master and an apprentice, in which some of the stipulations are not in favour of the one and some in favour of the other. But if we find a stipulation in the deed which is of such a kind that it makes the whole contract an unfair one, then that makes the whole contract void. The stipulation which is objected to must be so unfair that it makes the whole contract as between the apprentice, or the infant and the master, an unfair one to the infant. That brings us—in the case of apprenticeship deeds, and where the stipulation objected to is one as to the employment or as to wages—to consider whether any stipulation is so unfair to the apprentice that it affects the whole contract. Now, it had been held more than forty years ago (2), that where the stipulation as to wages comes to this, that the master has undertaken to pay wages to the infant, but reserves to himself the right (under peculiar circumstances which are wholly independent of any act of the apprentice) to do away with the first part of his contract, and insist that the apprentice, while bound to serve him, shall not be paid wages, then it was held that that was so unfair a stipulation as against the apprentice as to vitiate the whole contract. Therefore, adopting the rule laid down by Fry, L.J., this Court has to consider, in the particular case, whether the stipulation objected to is not such as to make the whole contract of service under particular circumstances unfair. Now, it having been held that this stipulation of not paying wages does make it unfair, can we overrule that and say that a stipulation, such as that as to wages, after all is not unfair? It seems to me that it would require a very strong conviction in one's mind to enable one to overrule decisions

(1) *De Francesco* v. *Barnum*, 45 Ch. D. 430.

(2) *Reg.* v. *Lord*, 12 Q. B. 757; 17 L. J. (M.C.) 181.

with regard to an ordinary and general contract come to many years ago, and upon the faith of which apprenticeship contracts are entered into, at all events by the infant and those who advise the infant at the time and control him. I cannot help thinking that if this were the first occasion on which the question was raised, we should consider the stipulation to be unfair. Take such a case as this: The master desires to have an apprentice; the father or mother of the infant desires to apprentice the infant; in the old days the infant would have lived in the master's house, and the master would have clothed the infant; but in the present day the master does not desire to have that obligation, and he therefore stipulates to pay the wages so that, so far as the father or mother, or the people who are responsible for the infant, are concerned, they at all events may be relieved from the obligation of having to keep the infant while he is serving the master for nothing. Therefore, they stipulate that the infant should be paid wages, and thereupon those wages come to their hands as a matter of course, and they feed and clothe the infant. The master, therefore, is relieved from that obligation. But then the master puts into the contract a stipulation which enables him, if other workmen offend him, although the apprentice has nothing to do with that offence, to refuse to pay wages to the infant, and thereby to throw the infant for nurture and clothing upon those who had been relieved of that obligation by a former part of the contract, at the same time holding the infant to continue in the service, and do work without any payment, provided he cannot or does not get employment from other people. It seems to me that that is so unfair to the infant, so solely in favour of the master, that it vitiates the whole contract and makes that contract void. I think, therefore, the decision of the magistrate on that ground is right, and must be maintained. The appeal will be dismissed.

LINDLEY, L.J. I am of the same opinion. I think Mr. Boddam was quite right when he said that we could not decide this case in his favour unless we overruled *Meakin* v. *Morris*. (1) There are some slight distinctions, but I do not think there are

(1) 12 Q. B. D. 352.

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Lindley, L.J.

any distinctions in principle, and I am not prepared to overrule that case. I think it was very distinguishable from *Leslie* v. *Fitzpatrick* (1), where the master merely stipulated for a power to terminate the agreement. That is not the case here. The apprentice binds himself to serve; the master binds himself to teach and to pay for five years. Then there is this proviso, which has been so much discussed and on which everything turns. I attach great importance myself to the fact that a turn-out includes a lock-out. If the proviso were addressed to a state of things over which the master might have no control, such as a strike, I think the case would not be so clear; but in this case the master has it in his own power to call in aid that proviso to the detriment of the apprentice, and if for any reason the master locks out his men the apprentice can no longer earn wages. That strikes me, I confess, as a very serious matter in considering or construing the effect of a deed of this description. I think the learned magistrate has come to a right conclusion, and I cannot differ from it.

A. L. SMITH, L.J. I am of the same opinion. When one looks to the authorities to which we have been referred, which traverse a period of more than forty years—the first is *Reg.* v. *Lord* (2), in 1848, and the last is before Fry, L.J., in 1890—it seems to me that the law as regards these contracts by infants has been laid down to this effect, that if there be a stipulation in the contract entered into by an infant so much to the detriment of the infant as to render it unfair that the infant should be bound by it, then the deed cannot be enforced at all. It seems to me the authorities are all in conformity with that view, with possibly the exception of the case of *Leslie* v. *Fitzpatrick*. (1) But the great distinction between that case and the other cases, including the one now before us, is that there the contract of service was to be terminated by the master, whereas in all these other cases the contract was not to be terminated, but the infant was to be bound, no matter what onerous covenant he was under, to continue the services during the period stipulated by the deed. Now, taking the rule as I have stated it as a guide, what do we

(1) 3 Q. B. D. 229. (2) 12 Q. B. 757; 17 L. J. (M.C.) 181.

find here? We find that the infant is not to reside with the master, and must therefore get lodging and food and clothing elsewhere, and in consideration of his serving his master the latter undertakes not only to teach him but to pay him wages. But then comes the proviso which covers the whole of the deed, and the proviso is that if the master thinks fit to turn out his workmen, no matter for how long or for how short a period, or how often during the five years during which the infant has contracted to serve the master—if the master chooses to turn out his men the infant is bound to serve his master without wages, unless he can get employment somewhere else during the unknown or uncertain time the turn-out may exist. As was said by the Master of the Rolls during the progress of this case—and I entirely agree with him—this is very illusory indeed, and it is very improbable that under such circumstances the infant would be able to get work elsewhere. It seems to me there is a stipulation contained in this proviso which covers this deed and which is unfair to the infant, and, taking the authorities as they have existed now for nearly half a century, I am of opinion the magistrate was right and this deed cannot be enforced.

Appeal dismissed.

Solicitors for appellants: *Cronin, Orgill, & Cronin, for Llewellyn & Ackrill, Tunstall.*

Solicitors for respondents: *Mear & Fowler, for E. Hollingshead, Tunstall.*

A. M.

1893
Jan. 18.

DANDO *v.* BODEN.

Bill of Exchange—Practice—Indorsement on Writ—Liquidated Demand—Expenses of Noting—"Bank Charges"—Bills of Exchange Act, 1882 (45 & 46 *Vict.* c. 61), *s.* 57.

By s. 57 of the Bills of Exchange Act, 1882, the holder of a bill may recover the expenses of noting, which are to be deemed to be liquidated damages.

In an action on a bill of exchange the writ was indorsed with a claim for the amount of the bill and a further sum described as "bank charges." The defendant failed to appear, and the plaintiff entered final judgment for the sum indorsed.

On appeal against an order setting aside the judgment:—

Held, that the words "bank charges" were a sufficient description of the expenses of noting; that the writ was therefore indorsed for a liquidated demand, within the meaning of Order XIII., r. 3, and final judgment was properly entered.

APPEAL from an order made by Kennedy, J., at chambers.

The action was brought on a bill of exchange. The writ was indorsed with a claim for the amount of the bill, 25*l.*, and for a further sum of 2*s.* 9*d.*, which was described in the indorsement as "bank charges." The defendant having failed to appear to the writ, the plaintiff entered final judgment for 25*l.* 2*s.* 9*d.* Kennedy, J., set aside this judgment. The plaintiff appealed.

A. T. Lawrence, for the plaintiff. The judgment was properly entered, and should not be set aside. Sect. 57 of the Bills of Exchange Act, 1882 (1) allows the holder of a bill to recover the expenses of noting, which by the terms of the Act are liquidated damages. These expenses are bank charges, and the plaintiff is entitled to enter final judgment under Order XIII., r. 3. (2)

(1) 45 & 46 Vict. c. 61, s. 57: "Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:—

"(1.) The holder may recover from any party liable on the bill . . .

"(*a.*) The amount of the bill . . .

"(*c.*) The expenses of noting."

(2) By the Rules of the Supreme Court, 1883, Order XIII., r. 3: "Where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and the defendant fails . . . . to appear thereto, the plaintiff may enter final judgment for any sum not exceeding the sum indorsed on the writ" with interest and costs.

The Court called on

Jelf, Q.C., and *Lyttelton*, for the defendant. The writ is not indorsed for a liquidated demand. Independently of statute, expenses of noting could only be recovered as unliquidated and special damages: *Rogers* v. *Hunt*. (1) There is nothing to shew that what are described as bank charges are expenses of noting. The recent decisions on Order XIV. support the defendant's contention: *Ryley* v. *Master*, and *Sheba Gold Mining Co.* v. *Trubshawe* (2); *Wilks* v. *Wood* (3); *Gold Ores Reduction Co.* v. *Parr*. (4)

DAY, J. I can entertain no doubt as to what our decision ought to be in this case. The Bills of Exchange Act, 1882, by s. 57 allows the holder of a bill to recover the expenses of noting, which the Act expressly declares "shall be deemed to be liquidated damages." In the present case the indorsement on the writ includes a claim for "bank charges," and in my opinion it is abundantly clear that this is a good indorsement for a liquidated demand. If something more than the expenses of noting were included in the indorsement that would be a good ground of objection; but the mere fact that the words used in the indorsement are not precisely the same as those used in the Act cannot affect the validity of the indorsement, for the Act does not prescribe the words which are to be used in an indorsement, but only provides that the expenses of noting are to be recoverable and shall be deemed to be liquidated damages. I am, therefore, of opinion that the order setting aside the plaintiff's judgment is wrong, and ought to be reversed.

COLLINS, J. I am of the same opinion. The plaintiff's claim is on a bill of exchange, and the indorsement on the writ includes a claim for "bank charges." It is contended on behalf of the defendant that there is no jurisdiction to treat this as a writ indorsed for a liquidated demand. It is true that if the claim indorsed on the writ were primâ facie a claim for unliquidated damages Mr. Jelf's contention would be well founded.

(1) 10 Ex. 474.
(2) [1892] 1 Q. B. 674.
(3) [1892] 1 Q. B. 684.
(4) [1892] 2 Q. B. 14.

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DANDO v. BODEN.

Collins, J.

But if bank charges are primâ facie expenses of noting this is a good indorsement for a liquidated demand. The question, therefore, is whether the use of the expression "bank charges" is consistent with the claim being for the expenses of noting. In my opinion, it is quite consistent with the claim being for nothing else than the expenses of noting. Sect. 57 of the Bills of Exchange Act, 1882, allows those expenses to be claimed, and declares that they shall be deemed to be liquidated damages, and, therefore, this is a writ indorsed for a liquidated demand, on which the plaintiff is entitled to final judgment by default for the amount indorsed.

Appeal allowed. (1)

Solicitors for plaintiff: *Field, Roscoe & Co., for Stokes & Hooper, Dudley.*

Solicitor for defendant: *G. Warmington, for Plant, Dudley.*

P. B. H.

1893

Jan. 21.

[CROWN CASE RESERVED.]

THE QUEEN *v.* WILLIAMS.

Criminal Law—Offences against the Person—Male under Fourteen—Acquittal on Charge of Carnally Knowing Girl under Thirteen—Indecent Assault—Criminal Law Amendment Act, 1885 (48 & 49 *Vict.* c. 69), ss. 4, 9.

Although a boy under fourteen, who is tried on an indictment under s. 4 of the Criminal Law Amendment Act, 1885, charging him with having had carnal knowledge of a girl under thirteen, is entitled to be acquitted of that offence, he may be convicted of an indecent assault under s. 9 of the Act.

CASE for the opinion of the Court for the Consideration of Crown Cases Reserved, stated by Wright, J., as follows:—

"Robert John Williams was indicted for having, at the parish of Holywell, on November 30, 1891, feloniously, unlawfully, and carnally known a girl under the age of thirteen years—to wit, of the age of nine years. The case came to be tried before me at Mold, at the Spring Assizes, 1892. It was suggested, on behalf of the prisoner, that he was under fourteen years of age;

(1) See *London and Universal Bank* v. *Earl of Clancarty*, [1892] 1 Q. B. 689; *Lawrence & Sons* v. *Willcocks*, [1892] 1 Q. B. 696.

and I, after hearing the evidence, put the question to the jury, who found that the prisoner was under fourteen. I directed the jury that the prisoner could not be convicted of the felony charged, or of an attempt to commit such felony. The prosecution insisted that under s. 9 of the Criminal Law Amendment Act, 1885, the prisoner was liable on the indictment for felony to be tried for indecent assault. I so held, and left the case to the jury, who found the prisoner guilty of indecent assault. I reserved this case on the question of law which arose at the trial, whether a male under the age of fourteen years, indicted for an offence under s. 4 of the Criminal Law Amendment Act, 1885, who by reason of his age cannot be tried or convicted for such offence, can under the provisions of s. 9 of the said Act be found guilty of an indecent assault, and I ordered the prisoner to be released on bail until this point should be decided."

No counsel appeared for the Crown, or for the defendant.

LORD COLERIDGE, C.J. In this case the prisoner was properly indicted for a rape under s. 4 of the Criminal Law Amendment Act, 1885. He was proved at the trial to be under the age of fourteen, and therefore could not by law be convicted of rape; nor could he, in my opinion, be convicted of attempting to do that which the law says he was physically incapable of doing. He was, therefore, properly acquitted of the charge made under the 4th section. But s. 9 provides that if upon the trial of any indictment for rape, or any offence made felony by s. 4, the jury shall be satisfied that the defendant is guilty of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then they may acquit the defendant of the felony, and find him guilty of an indecent assault. The Act of Parliament, therefore, says that the defendant may be convicted of an indecent assault under circumstances like these. I am of opinion that the conviction should be affirmed.

HAWKINS, J. I think that the conviction should be affirmed; but I do not assent to the notion that a boy cannot be convicted

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Hawkins, J.

of an attempt to do that which the law says he cannot do. That difficulty, however, does not arise here. The defendant was indicted under the statute for having feloniously, unlawfully, and carnally known a girl under the age of thirteen years. He could not have been convicted of a rape, apart from the statute, because that offence consists of carnally knowing a girl against her will; but this offence, created by the statute, of having carnal knowledge of a girl under the age of thirteen, seems to be of the same character as rape, and it has recently been held that a boy under the age of fourteen cannot be convicted, under s. 4, of having carnal knowledge of a girl under the age of thirteen. (1) Therefore, though the boy was rightly put on his trial, Wright, J., ruled that the objection taken before him must prevail. It then becomes necessary to consider s. 9 of the statute, which provides, that "if upon the trial of any indictment for rape, or any offence made felony by s. 4 of this Act, the jury shall be satisfied that the defendant is guilty of . . . . an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then in every such case the jury may acquit the defendant of such felony, and find him guilty . . . . of an indecent assault." Here there was a trial of an indictment lawfully found and presented by the grand jury. It was a trial of an indictment for an offence under s. 4. As the defendant could not be convicted of carnally knowing the girl, under s. 4, the jury were not satisfied that he was guilty of the felony charged in the indictment; and under those circumstances they could, if they thought he had committed an indecent assault, find him guilty, under s. 9, of that offence.

CAVE, J. I am of the same opinion. I think the defendant was properly convicted of an indecent assault. As to the question whether a boy under fourteen could be convicted of an attempt to commit the felony created by s. 4, I desire a further discussion of that question before deciding it. At present I am inclined to concur in the opinion expressed by my brother Hawkins.

(1) *Reg.* v. *Waite*, [1892] 2 Q. B. 600.

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DAY, J. I agree that the conviction should be affirmed. I need not repeat the reasons, which have been already given. I agree with what has been said by my brother Cave.

COLLINS, J. I am of the same opinion.

Conviction affirmed.

W. A.

IN RE SMITH. EX PARTE MASON.

1892
Oct. 28.

Bankruptcy—Gasworks Clauses Acts—Recovery of Gas Rents—Receiving Order—Official Receiver—"Occupier"—Gasworks Clauses Act, 1847 (10 & 11 *Vict. c.* 15), *s.* 16—*Gasworks Clauses Act*, 1871 (34 & 35 *Vict. c.* 41), *ss.* 11, 39—*Metropolis Gas Act* (23 & 24 *Vict. c.* 125), 1860, *ss.* 4, 14–19, 39.

By the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 16, the undertakers of gasworks are empowered to cut off the gas from the premises of any person for non-payment of rent due for gas supplied to him. By the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 11, it is made compulsory upon the undertakers, when required by the "owners or occupiers" of any premises within the prescribed limits, to supply gas to such premises; and by s. 39, in case any consumer leaves the premises where gas has been supplied to him without paying the gas rent the undertakers shall not be entitled to require from the next tenant of such premises the payment of the arrears left unpaid by the former tenant. A receiving order having been made against a debtor, the gas company cut off the supply of gas to his premises, and refused to reconnect it until the arrears of gas rent due from him were paid, whereupon the official receiver paid the amount under protest. The debtor having been adjudged bankrupt:—

Held, that the trustee in bankruptcy was not entitled to recover back from the gas company the amount so paid by the official receiver, for, notwithstanding the receiving order, the debtor continued to be the occupier of the premises, and there was consequently no obligation on the part of the company to supply gas to such premises without payment of the arrears due to them.

THIS was an application by the trustee in bankruptcy asking that the South Metropolitan Gas Company might repay to him the sum of 173*l.* 10*s.* 6*d.*, being moneys of the bankrupt paid to them under protest in order to obtain a reconnection of gas supply to the business premises of the bankrupt under the following circumstances.

On February 22, 1892, a receiving order was made against James Smith, who was carrying on a large business at Brixton,

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IN RE SMITH. EX PARTE MASON.

and the official receiver took possession of the business premises and property. At this time James Smith owed the South Metropolitan Gas Company 173*l.* 10*s.* 6*d.* for gas supplied to his business premises down to the previous 25th of December; and on February 20, 1892, he sent them a cheque for the amount. The cheque, however, was not presented for payment until February 24, when payment was refused in consequence of the receiving order. Thereupon the gas company cut off the supply of gas to the premises, and refused to reconnect it unless the whole of the arrears due to them was paid. As the supply of gas was absolutely necessary for the purposes of the debtor's business, the official receiver paid the 173*l.* 10*s.* 6*d.* under protest, and the debtor having been adjudged bankrupt, the trustee in bankruptcy moved that that sum might be refunded to the estate by the gas company.

Tindal Atkinson, Q.C., and *Muir Mackenzie*, for the motion. The gas company obtained a preferential payment to which they were not entitled. Under s. 39 of the Gasworks Clauses Act, 1871, an incoming tenant is not liable for arrears of gas rent, and by s. 11 of that Act the gas company are bound to supply gas on the application of an "owner or occupier." (1) The question turns on the meaning of the word "occupier." There is no definition of that word in the Gasworks Clauses Acts, 1847 and 1871; but in the Metropolis Gas Act, 1860, ss. 14 to 20, which

(1) By the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 16, the undertakers of gasworks are empowered to cut off the gas from the premises of any person for non-payment of rent due for gas from him.

By the Gasworks Clauses Act, 1871, s. 11: "The undertakers shall, upon being required so to do by the owner or occupier of any premises situate within twenty-five yards from any main of the undertakers, or such other distance as may be prescribed, give and continue to give a supply of gas for such premises under such pressure in the main as may be prescribed, and they shall furnish and lay any pipe that may be necessary for such purpose. . . ."

Sect. 39: "In case any consumer of gas supplied by the undertakers leaves the premises where such gas has been supplied to him without paying the gas rent or meter rent due from him, the undertakers shall not be entitled to require from the next tenant of such premises the payment of the arrears left unpaid by the former tenant, unless such incoming tenant has undertaken with the former tenant to pay or exonerate him from the payment of such arrears."

are the corresponding sections dealing with the supply of gas, the word "consumer" is used as well as "tenant or occupier" in such a way as to shew that they are correlative terms, and s. 39 of the same Act is almost identical with s. 39 of the Gasworks Clauses Act, 1871. Then s. 4 of the Metropolis Gas Act, 1860, defines "consumer" to be a person receiving or entitled to receive a supply of gas. It is submitted that the word "occupier" in the Gasworks Clauses Act, 1871, is an elastic expression and may be reasonably construed to include a "consumer," and it is to be observed that the latter word is used in s. 39 of the Act. Here the official receiver was entitled to receive a supply of gas, and it was absolutely necessary for the preservation of the business.

[They also referred to *In re Thomas.* (1)]

H. Reed, Q.C., and *Mellor*, for the gas company. A receiving order does not divest a debtor of his property: *Rhodes* v. *Dawson.* (2) Therefore the debtor here remained the occupier of the premises. The official receiver was merely manager until the appointment of the trustee. There could not be two occupiers of the premises at the same time, and the receiving order did not put an end to the contracts of the debtor with the company. There was no change of occupancy unless it can be shewn that the official receiver was an incoming tenant within the meaning of s. 39 of the Gasworks Clauses Act, 1871. If he was, then he had a summary remedy under the Act, and could have compelled the gas company to supply him without paying anything. The gas company were justified in insisting on the payment of the arrears as the condition on which they would reconnect the gas.

Tindal Atkinson, Q.C., in reply.

Vaughan Williams, J. I have arrived at the conclusion that the gas company are right in their contention. No doubt if the matter were to come before the legislature again, very strong arguments might be urged for requiring some provision to enable an official receiver to insist upon the supply of the gas without paying the arrears due by the debtor against whom the receiving order has been made; but I have no right to strain the Act of

(1) 4 Mor. 295. (2) 16 Q. B. D. 548, at p. 553.

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Vaughan Williams, J.

Parliament and to insert into it by construction provisions that are not there in fact.

It is conceded that the receiver is not entitled to call upon the gas company to supply him with gas unless he is an "occupier or owner" within the meaning of s. 11 of the Gasworks Clauses Act, 1871. It is also conceded that there cannot be two owners or occupiers of the same undivided premises at the same time, and, that being so, it is plain that the receiver could not claim a supply of gas as "occupier" here unless he was in a position to say that the occupation of the debtor had come to an end. It seems to me quite plain that the occupation of the debtor had not come to an end. The case of *Rhodes* v. *Dawson* (1) shews that his estate is unaltered by the making of the receiving order. The same premises continue to be vested in him that were vested in him before the making of the receiving order. Then it was suggested, that although the premises might still be vested in him the contract had been put an end to by the making of the receiving order. I do not agree to anything of the sort. I asked for authority for that proposition, but no authority was given to me.

Therefore we have it that the estate remains the same, and the contract remains the same, and, beyond that, it seems to me that the occupation of the debtor remains the same. I do not know, I am sure, whether there might not be cases in which the debtor might abscond and leave the premises vacant in such sense that he could no longer be described as the occupier; but it is not suggested that he did so here. In my opinion, he continued the occupier in law and in fact, notwithstanding the making of the receiving order and the consequent appointment of the official receiver by virtue of the statute to act until it should be determined what course should be taken about the debtor's estate.

The motion must be refused with costs.

Solicitor for the trustee: *J. A. Bartrum.*

Solicitors for the gas company: *Hicklin, Washington, & Pasmore.*

H. L. F.

(1) 16 Q. B. D. 553.

[IN THE COURT OF APPEAL.]

C. A. 1893 Jan. 20.

IN RE MILLER. EX PARTE OFFICIAL RECEIVER.

Bankruptcy—Preferential Payment—Debt due to Friendly Society by Bankrupt Treasurer—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *s.* 15 (7)—*Bankruptcy Act*, 1883, *s.* 40—*Preferential Payments in Bankruptcy Act*, 1888 (51 & 52 *Vict. c.* 62), *s.* 2 (1).

Sect. 15 of the Friendly Societies Act, 1875, provides that registered friendly societies "shall be entitled to the following privileges" (inter alia), "(7.) Upon the bankruptcy of any officer of a society having in his possession by virtue of his office any money or property belonging to the society . . . his trustee in bankruptcy shall upon demand in writing . . . pay such money and deliver over such property to the trustees of the society, in preference to any other debts or claims against the estate of such officer":—

Held, that under this section the trustees of a friendly society are, upon the bankruptcy of the treasurer of the society, entitled to be paid out of his estate the balance due from him to the society in respect of moneys which he has received for them, even though he has not in his possession those moneys in specie, and they cannot be traced.

The decision of Bacon, C.J., in *Ex parte Edmonds* (30 W. R. 432), approved.

APPEAL by the official receiver, as trustee in the bankruptcy of John Miller, against an order of a Divisional Court (Vaughan Williams and Wright, JJ.), discharging a previous order of the county court at Maidstone, and directing the trustee to pay out of the bankrupt's assets a sum of 100*l.* 6*s.* 7*d.*, which at the commencement of the bankruptcy was due by him to the trustees of a registered friendly society, of which the bankrupt had been the treasurer.

The bankrupt, as treasurer of the society, received the subscriptions payable by the members of the society. On January 22, 1892, the bankrupt absconded; and on February 4 a receiving order was made against him on the petition of a creditor, and he was afterwards adjudged a bankrupt. The bankrupt's property consisted of—balance at his bankers, 13*l.* 17*s.* 1*d.*; proceeds of sale of property by trustee, 122*l.* 15*s.* 6*d.*; and valuation of a public-house to a new tenant, 251*l.* 19*s.*—making a total of 388*l.* 11*s.* 7*d.* realized by the official receiver as trustee in the bankruptcy. The money received by the bankrupt for the friendly society did not at the commencement of the bankruptcy

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exist in specie, nor could it in any way be traced into any of his assets.

The county court judge held that s. 15, sub-s. 7, of the Friendly Societies Act, 1875, did not entitle the trustees of the society to be paid the 100*l.* 6*s.* 7*d.* in priority to the other creditors of the bankrupt, and that the trustees must prove in the bankruptcy pari passu with the other creditors.

The Divisional Court, without expressing any opinion of their own upon the construction of s. 15, sub-s. 7, were of opinion that they were bound by the decision of Bacon, V.C., as Chief Judge in Bankruptcy, in *Ex parte Edmonds* (1), to hold that under that sub-section the trustees were entitled to payment in priority. The Court accordingly discharged the order of the county court, and ordered the official receiver to pay the 100*l.* 6*s.* 7*d.* to the trustees of the friendly society.

The official receiver appealed.

Sir C. Russell, A.G., and *Muir Mackenzie*, for the appellant. The priority given by s. 15, sub-s. 7 (2) of the Friendly Societies

(1) 30 W. R. 432.

(2) The Bankruptcy Act of 1849 provided by. s. 167: "If any person already appointed or employed, or who may be hereafter appointed to or employed, in any office in any society established under any of the Acts relating to friendly societies, and being intrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his office or employment, any moneys or effects belonging to such society, or any deeds or securities relating to the same, shall have been or shall become bankrupt, the Court shall, upon application made by the order of any such society, &c., order payment and delivery over to be made to such society, ... of all moneys and other things belonging to such society, and shall also order payment out of the estate and effects of the bankrupt of all sums of money remaining due which the bankrupt received by virtue of his said office or employment, before any other of his debts are paid or satisfied."

By the Friendly Societies Act, 1855, s. 23: "If any person already appointed or employed, or hereafter to be appointed or employed, to or in any office in any friendly society established under this Act, or under any of the Acts hereby repealed, ... and having in his hands or possession, by virtue of his office, any moneys or property whatsoever of such society, or any deeds or securities belonging to such society, shall die, or become bankrupt or insolvent . . . . the heirs, executors, administrators, or assignees of every such officer, and every other person having or claiming right to the property of such officer . . . . shall upon demand in writing made by the treasurer of such society, &c. . . . . deliver and pay over all

Act, 1875, over the other creditors of a bankrupt officer of the society, applies only when the bankrupt has moneys of the society in his possession in specie, or when money of the society which he has received can be traced. Sect. 167 of the Bankruptcy Act of 1849 contained, in addition to a provision that any moneys or effects belonging to a friendly society, which should be in the possession of a bankrupt officer of the society, should be paid and delivered over to the society, an express provision that "all sums of money remaining due which the bankrupt received by virtue of his office" should be paid out of his estate in priority to his other debts. Sect. 23 of the Friendly Societies Act of 1855 (18 & 19 Vict. c. 63) contained a similar express provision. Sects. 32, 33, and 34 of the Bankruptcy Act,

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such moneys, property, deeds, and securities belonging to such society, to such person as such treasurer or trustees shall appoint, and shall pay out of the estate, assets, or effects, heritable or moveable, of such officer, all sums of money due, which such officer shall have received, before any other of his debts are paid, and before any other claims upon him shall be satisfied. . . . ."

Sects. 32, 33, and 34 of the Bankruptcy Act, 1869, which dealt with preferential debts and claims in bankruptcy, contained no provision relating to friendly societies.

By the Friendly Societies Act, 1875, s. 15: "Registered societies shall be entitled to the following privileges" (inter alia):—

"(7.) Upon the death, or bankruptcy, or insolvency of any officer of a society having in his possession by virtue of his office any money or property belonging to the society, ... his heirs, executors, or administrators, or trustee in bankruptcy or insolvency, ... shall upon demand in writing of the trustees of the society, or any two of them, or any person authorized by the society, or by the committee of management of the same, to make such demand, pay such money, and deliver over such property to the trustees of the society, in preference to any other debts or claims against the estate of such officer."

By the Bankruptcy Act, 1883, s. 40: "(1.) In the distribution of the property of a bankrupt there shall be paid in priority to all other debts," certain specified debts.

"(4.) Subject to the provisions of this Act, all debts proved in the bankruptcy shall be paid pari passu."

"(6.) Nothing in this section shall . . . . prejudice the provisions of the Friendly Societies Act, 1875."

By the Preferential Payments in Bankruptcy Act, 1888, s. 1: "(1) In the distribution of the property of a bankrupt . . . . there shall be paid in priority to all other debts" certain specified debts.

"(5.) This section, so far as it relates to the property of a bankrupt, shall have effect as part of s. 40 of the Bankruptcy Act, 1853."

By s. 2 (1): "Nothing in this Act shall . . . . prejudice the provisions of the Friendly Societies Act, 1875."

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1869, which dealt with preferential debts and claims in bankruptcy, contained no provisions as to friendly societies. The Act of 1849 was repealed by the Act of 1869; but meanwhile the Act of 1855 had been passed, and s. 23 of that Act secured to friendly societies the priority which they had had under s. 167 of the Bankruptcy Act, 1849. Then came the Friendly Societies Act of 1875, by which the Act of 1855 was repealed, and there is a marked change in the language of s. 15, sub-s. 7. Priority is still given to a friendly society as regards money and goods in the possession of the bankrupt officer; but nothing is said about the payment in priority of debts due from him to the society. The omission of the former provision as to the payment of debts shews an intention on the part of the legislature to limit the priority of friendly societies to the case of money or effects in the possession of the officer in specie, or which can be traced. It was necessary that there should be a statutory provision to meet such cases, for until the decision of the Court of Appeal (in 1880) in *In re Hallett's Estate* (1), the general law on the questions of following trust money and appropriation of payments was not settled. In that case a previous decision of Fry, J.—*Ex parte Dale* (2)—was disapproved. But, even if the literal construction of a statutory enactment would shew that such enactment was unnecessary, it does not follow that another and an unnatural construction ought to be given to it in order that it may have some operation. The decision of Bacon, C.J., in *Ex parte Edmonds* (3), by which the Divisional Court considered that they were bound, is not binding on this Court. It in effect construed s. 15, sub-s. 7, in exactly the same way as if it had contained the words which were in s. 23 of the Act of 1855, but have now been omitted. Sect. 40 of the Bankruptcy Act, 1883, and ss. 1 and 2 of the Preferential Payments in Bankruptcy Act, 1888, do not affect the question; they are expressed to be without prejudice to the provisions of the Act of 1875.

Herbert Reed, Q.C., and *Frank Mellor*, for the friendly society. In *Crowther* v. *Elgood* (4), Cotton, L.J., at p. 695, expressed an opinion that in s. 4, sub-s. 3, of the Debtors Act, 1869, the words

(1) 13 Ch. D. 696.
(2) 11 Ch. D. 772.
(3) 30 W. R. 432.
(4) 34 Ch. D. 691.

"ordered to pay by a Court of Equity any sum in his possession or under his control," "cannot mean any sum which at the time of making the order was in his possession or under his control, but any sum which had at one time been in his possession or under his control."

The privilege of priority of payment, as against the other creditors of a bankrupt officer, was first given to friendly societies in 1793 by the Act 33 Geo. 3, c. 54, s. 10, and it was continued by 10 Geo. 4, c. 56, s. 20, and 4 & 5 Wm. 4, c. 40, s. 12, and again by s. 167 of the Bankruptcy Act of 1849, and by s. 23 of the Friendly Societies Act of 1855. It cannot be supposed that the legislature intended in 1875 to take away this privilege which had existed for so long. And, by expressly declaring that the provisions of the Acts of 1883 and 1888 were not to prejudice the provisions of the Act of 1875, the legislature have adopted the judicial interpretation of s. 15, sub-s. 7, of that Act: *The Anna.* (1) The decision of Bacon, C.J., in *Ex parte Edmonds* (2), has thus received a statutory recognition, and at any rate it has been acted upon by friendly societies for more than ten years as regards the security to be given by their treasurers, and this Court will not now overrule it. The construction adopted by Bacon, C.J., was right. On the other construction, no "privilege" would be conferred on friendly societies. Trust money or effects which are *in specie*, or the proceeds of which can be traced, do not vest in the trustee in bankruptcy of the trustee.

Muir Mackenzie, in reply. It cannot be supposed that friendly societies have entered into contracts in contemplation of the bankruptcy of their treasurers. The Court has to construe the words of s. 15, sub-s. 7. The legislature have repealed one section, and have enacted in place of it another which is expressed very differently.

LORD ESHER, M.R. In my opinion, this appeal must be dismissed.

The bankrupt was the treasurer of a friendly society. At the time of his bankruptcy he had at his bankers a balance of

(1) 1 P. D. 253. (2) 30 W. R. 432.

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about 13*l*. There were some book debts owing to him, and the money receivable in respect of those book debts was certainly not in his possession; but the book debts would have to be collected in money. He had also some other property which, if it were realized in the bankruptcy, would produce money. All those things together would put money into the hands of the trustee, as having been the money of the debtor at the time of his bankruptcy, which it would be the duty of the trustee to distribute amongst the creditors. The bankrupt, who had been, as I have said, the treasurer of a friendly society, had received subscriptions in money for the society, but had not paid them over to the trustees of the society, the balance due from him as treasurer being over 100*l*. The trustees of the society claim to be entitled to be paid out of the money of the bankrupt which is in the hands of the trustee the 100*l*., in priority to the other creditors.

The question whether they are so entitled depends upon the construction of s. 15, sub-s. 7, of the Friendly Societies Act, 1875. The trustees of the society say that that sub-section gives them the priority which I have mentioned. On the other hand, it is contended that, on the true construction of s. 15, sub-s. 7, the trustees of the society have no such priority, because they cannot shew that the bankrupt had "in his possession" at the time of his bankruptcy the money which had been paid to him as treasurer. It is said that the money was not "in his possession" according to the true construction of sub-s. 7. Now, if sub-s. 7 is to be so construed, it must be admitted that the whole course of legislation with regard to the priority given to friendly societies, in case of the bankruptcy of any of their officers, was altered in 1875, after that privilege in favour of those societies had existed by statute ever since the year 1793. We must consider, as it seems to me, whether the words of sub-s. 7 oblige us to say that there has been such a startling alteration in the view of the legislature. If the words of sub-s. 7 do not compel us to say that there was, I think the inclination of the Court would rightly be so to construe the sub-section as not to alter that long course of legislation. Unless it is perfectly clear that the legislature intended to make this

alteration, the sub-section ought to be construed as meaning, that, with regard to that which the legislature have for so long a time thought to be right, they have not suddenly come to the conclusion that it was wrong.

And, when one considers the nature of the case one would, I may say, almost assume that the legislature (unless they have inadvertently done otherwise) must have maintained the privilege. Just observe what a friendly society is. Its business consists in the collecting and keeping the money of poor people, which is paid by them in small sums to the society in order that it may be kept for them as a mode of saving their earnings. If their money, which is in the hands of an officer of the society, is to be treated as his money, which is to give him credit with his tradesmen or other creditors, these poor people will have no real and effective means of controlling such an officer, and will be exposed to the greatest risk of ruin. This consideration must strike one's mind very forcibly at the present moment, when friendly societies and other similar societies have been crashing almost every day through the misconduct of their officers—conduct which is entirely beyond the control of the poor people who have invested their money in the society. I should be very much disinclined to take away that long line of protection, unless I were obliged to do so. I am not speaking of any personal disinclination; but I believe that is the right judicial view to take of an Act of Parliament.

Now, let us see whether sub-s. 7 does clearly take away that protection. There are other parts of the Act besides that subsection which make it pretty clear to my mind that it was not intended to do so. But, if that sub-section had stood alone, and it had been enacted for the first time, I should say that it gives—not merely that it does not take away, but that it gives—the protection which is now asserted upon the bankruptcy of any officer of a friendly society "having in his possession by virtue of his office any money or property belonging to the society." Now, the phrase, "belonging to the society," is not a technical term of legal art. The words, "belonging to the society," seem to me as large as could well be used. They point to any money or property which, in ordinary language, would be

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said to "belong to" the society. It does not say which is "the property" of the society, but any property "belonging to" the society. Then the sub-section goes on to provide that "upon demand in writing of the trustees of the society," and so on, the trustee in the bankruptcy "shall pay such money and deliver over such property to the trustees of the society." The trustee is to "pay such money"; but he is to "deliver over such property." "Money" and "property" are clearly distinguished; and I confess that, to my mind, the word "property" here does not include "money." The words are, to "pay" money and to "deliver" property. If it had been necessary to identify the actual money which had been received, I cannot think that the phraseology used would have been to "pay" the money. Other words, such as "to pay over the money," would, I think, have been used. But the words used are, "pay such money." That is the phraseology ordinarily used when speaking of the payment of a debt. To "pay" money is to pay it in respect of a right which some person has to receive it—not to pay over any particular money or hand over any particular coins.

If it had been intended that the moneys should be identified as the actual moneys deposited with the officer, the words used ought to have been, "deliver such money and such property." But the words are, "pay such money and deliver over such property" to the trustees of the society. Then come the words, "in preference to any other debts or claims against the estate of such officer." That is an English idiom. Whenever it is said that you are to do a certain thing, and then it is added, "in preference to," or "in the same manner as," some other thing, according to the ordinary English idiom, the thing of which you are speaking is of the same kind as the other thing to which you refer. The word "other" couples the two things together, and shews that they are of the same kind. Therefore, the payment of the money is a payment of the same kind as the payment of any other debt. The payment of the money is to be "in preference to any other debts"—that is, in preference to the payment of any other debts. This money is to be paid in preference to paying money in respect of any other debt. That makes the payment of this money a payment of the same kind as the pay-

ment of money in respect of any other debt. The property is dealt with in just the same way: it is to be delivered over in preference to any other "claim." If there is property which is not money—something which is in actual existence—then the society may claim that property, and it is to be delivered over to them in preference to the claim of any one else for the delivery of that property. So, in my view, sub-s. 7 itself shews that the money which the trustee in the bankruptcy is to pay by way of preference to the trustees of a friendly society is treated, not as the actual pieces of money—the gold, silver, or copper—which the bankrupt had received, but as "money" in the ordinary sense of the word. When you are dealing with a bankrupt's estate, it seems to me that, inasmuch as the trustee in the bankruptcy has to pay the creditors, all that property of the bankrupt which will be money in the hands of the trustee is "money" within s. 15, sub-s. 7. Sect. 15, sub-s. 7, applies not only to that which is money in the actual possession of the bankrupt at the time, but also to everything which will be money in the hands of the trustee with which he has to deal as being the money of the bankrupt. Sub-s. 15, sub-s. 7, therefore, includes such things as book debts and other things which, in the ordinary course of the bankruptcy proceedings, the trustee must reduce into money before he can deal with them.

But, if we look, not only at sub-s. 7, but also at the introductory words of s. 15, "registered societies shall be entitled to the following privileges," it is plain that sub-s. 7 was intended to create a privilege. But, as has been pointed out during the argument, if sub-s. 7 is construed as meaning that the trustee in the bankruptcy is to hand over to the trustees of the benefit society only the actual specific money which the bankrupt officer held as trustee for the society, without the aid of that sub-section—under the ordinary law applicable to trust property—the specific money could not be touched by the other creditors of the bankrupt, but must be given up to the trustees of the society. If that were so, sub-s. 7 would confer no privilege at all; it would be a mere statement of the ordinary law. There would be no privilege; there would be nothing but a statement of an already existing legal right. The legislature must have intended to go

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beyond the ordinary law; and the only way in which sub-s. 7 can operate to confer a privilege beyond the ordinary law is by construing it as applying, not only to specific money in the hands of the officer, but also to a debt due from him to the society in respect of money which he has received for it.

Upon the construction, therefore, of sub-s. 7 alone, I should have come to the conclusion that the trustees of this society are entitled to priority of payment. But, having regard also to the introductory words of s. 15, it seems to me reasonably clear—as clear as legislation generally is—that it must have the larger construction. That larger meaning was put upon it in the year 1882 by Bacon, C.J., in *Ex parte Edmonds* (1); and from that time trustees in bankruptcy and trustees of friendly societies must have had to act upon sub-s. 7 over and over again, and the decision in that case has never been challenged. If, therefore, sub-s. 7 is reasonably capable of the interpretation then put upon it by Bacon, C.J., his decision ought not now to be overruled, unless we are perfectly clear that it was wrong.

Moreover, since that decision, two new statutes dealing with priorities in bankruptcy have been passed, and in neither of them has any step been taken to interfere with that decision. I do not say that that of itself is absolutely fatal to the more strict construction; but it is a thing to be observed, that the legislature, having, as it must be assumed, that decision before them when they were framing the Acts of 1883 and 1888, did not interfere with the interpretation which had been given to s. 15, sub-s. 7. It may be that we ought now to differ from that decision, if we were perfectly clear that it was wrong; but I am not clear that it was wrong. And it is a circumstance to be very much considered, that a decision of a superior Court as to the construction of an Act of Parliament has remained untouched by the legislature for a considerable period of time; although they have in that interval legislated with regard to the matter in question, and it has been taken into their consideration. I think, therefore, we ought to say that s. 15, sub-s. 7, has the larger construction which was given to it by Bacon, C.J., in the year 1882. Even if I had greater doubt than I have as to the cor-

(1) 30 W. R. 432.

rectness of his judgment, I should, for the reasons which I have given, feel very strongly that his decision ought to be treated as accurate. In my opinion, this appeal must fail, and the decision of the Divisional Court must be affirmed.

Lindley, L.J. This sub-section is not so plain that there can be no possible doubt about its meaning; but in my view it can be made plain almost to demonstration that the construction adopted by the Divisional Court was right. We must bear in mind one or two very elementary propositions of law. In the event of a bankruptcy, property which is vested in the bankrupt upon trust, or which is in his possession for the purpose of being applied to some specific purpose, does not pass to the trustee in the bankruptcy. In the event of the death of a trustee, the trust property passes, it is true, to his executor, but it does not form part of the assets of the deceased. The executor must deal with such property as the property of the cestui que trust. In the case of an execution under a fi. fa., the sheriff cannot touch property which belongs to the debtor as a trustee, for it is not his property. Bearing this in mind, and bearing in mind also that the treasurer of a friendly society is a trustee, what can sub-s. 7 mean? If you read it in the strict, literal sense, as we have been invited to do, the sub-section misses the mark altogether; it effects nothing at all. The words are, "having in his possession, by virtue of his office, any money or property belonging to the society." Taking the words literally in their strict and narrow sense, the sub-section is not wanted. The trustee in a bankruptcy could not touch the money; the executor could not treat it as part of his testator's assets; the sheriff, under a fi. fa., would have nothing to do with it. What, then, was the object of the section? The object of s. 15 must be, as the earlier part of it says, to give to friendly societies some kind of "privilege"—to give them something which they would not have had without the section; and, unless you read the section in that sense, you render it of no use at all. That is, to my mind, the key to the whole of this controversy. The Attorney General endeavoured to meet that by saying, that the law to which I have alluded was not so clearly settled in 1875 as it is now, and he referred to

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In re Hallett's Estate (1) in support of his contention. But the law to which I have referred was old and well settled long before 1875. What was doubtful, and what was settled in *In re Hallett's Estate* (1), was this—how the rule in *Clayton's Case* (2) was to be applied to a banker's account, when a trustee had mixed trust money with his own money at his bankers. That is a more difficult problem; but it has nothing to do with the section we are now considering, and the decision in *In re Hallett's Estate* (1) throws no light upon its construction. It seems to me that we are in this dilemma. We must either construe sub-s. 7 as the Divisional Court have construed it, or we must accede to the Attorney General's contention, and read the words literally in their narrowest sense, and so nullify the sub-section altogether. Of these alternatives, there cannot be a doubt which we ought to adopt. But, if we look at the Act of 1888 which amends s. 40 of the Bankruptcy Act, 1883, all doubt, as it seems to me, is removed. The Act of 1888, by which sub-ss. 1 and 2 of s. 40 of the Act of 1883 were repealed, contains precisely the same words as s. 40 itself. Neither s. 4 of the Act of 1883, nor s. 1 of the Act of 1888, deals with the property vested in the trustee. Sect. 40 deals with the property which is divisible among the creditors, the proof of debts, and the priority of debts, and it says, first, that "subject to the provisions of this Act, all debts proved in the bankruptcy shall be paid pari passu." This would apply to a friendly society; but there is this proviso: "Nothing in this section shall prejudice the provisions of the Friendly Societies Act, 1875." How could a section relating to the proof and the priority of debts prejudice the provisions of the Friendly Societies Act, if that Act is construed as the Attorney General invited us to construe it? There is a similar proviso in s. 2 of the Act of 1888, and in either case the proviso only becomes intelligible upon the assumption that s. 15, sub-s. 7, of the Friendly Societies Act refers, not to the property which vests in the trustee in a bankruptcy, but to the proof of debt when the property of the bankrupt officer had vested in the trustee in his bankruptcy.

It appears to me, therefore, that, without referring to *Ex parte Edmonds* (3), and without going into the anterior history of

(1) 13 Ch. D. 696. (2) 1 Mer. 572. (3) 30 W. R. 432.

friendly societies, the construction put by the Divisional Court upon sub-s. 7 is right. It follows, of course, that I think the decision of Bacon, C.J., in *Ex parte Edmonds* (1) was right. But, if we look at the history of this legislation about friendly societies, the conclusion at which I have arrived is very strongly confirmed. It is idle to suppose that, when the legislature were re-casting the law relating to friendly societies in 1875, they intended to deprive them of those privileges which they had enjoyed from the year 1793. I think it is impossible, in the face of the language which we have before us, to suppose that. The truth is, that the whole difficulty has arisen from an incautious abridgment of the words of previous Acts. The draftsman of the Act of 1875 thought that he could shorten s. 23 of the Act of 1855, and in shortening it he has made it obscure. That is the history of s. 15, sub-s. 7, of the Act of 1875. But, when we look into the matter, I have not the slightest doubt that the right construction is that which I have mentioned, and, therefore, I think that the appeal must be dismissed.

A. L. SMITH, L.J. I am of the same opinion. Whatever doubt might have been entertained as to the true construction of sub-s. 7, if without any prior legislation it had now for the first time come up for adjudication, is set at rest when the legislation relating to the privileges of friendly societies is ascertained. From 1793 down to 1875 it is admitted that these societies had the privilege now claimed for them. The Act which we are called upon to construe was passed in 1875. In 1882, Bacon, V.C., sitting as Chief Judge in Bankruptcy, put a construction upon this Act in favour of friendly societies, and since then two other Acts have been passed recognising this privilege. When I take all this into consideration, the doubt I at one time felt as to the construction of s. 15, sub-s. 7, vanishes. I agree with my brother Lindley that the difficulty which has been suggested has arisen simply from the draftsman in 1875 attempting to curtail a very lengthy section of the Act of 1855, and to bring about the same result by more concise language. In my judgment, the decisions of Bacon, C.J., and of the

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Divisional Court were right, and, therefore, this appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Solicitor to Board of Trade; A. H. Arnould & Sons.*

W. L. C.

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[IN THE COURT OF APPEAL.]

BARNARD *v.* FABER.

Insurance, Fire—Lloyd's Fire Policy—Warranty—Condition precedent—Liability.

The defendant and other underwriters subscribed a fire policy, which contained the following clause: "Warranted to be on same rate, terms, and identical interest as U. Insurance Company 800*l.* and G. Insurance Company 700*l.*" In the policy of one of the two companies the premium and also the interest insured differed from those in the defendant's policy:—

Held, that the warranty must be taken to be a condition precedent; that the facts shewed that there had been a breach of such warranty; and that the policy was consequently void, and the defendant not liable.

ACTION upon a policy of insurance against fire.

At the trial before Wright, J., without a jury, it appeared that the plaintiff, having insured against loss or damage by fire the furniture and other effects in Barnard's Palace of Varieties and the Bell Tavern, Portsmouth, with the Union Assurance Society for sums amounting to 800*l.*, and with the Glasgow and London Insurance Company, Limited, for sums amounting to 700*l.*, effected a Lloyd's fire policy thereon for 1000*l.* at 25*s.* per cent. premium. The policy covered the whole of the furniture and effects as one interest, and contained the following clause: "Warranted to be on same rate, terms, and identical interest as Union Insurance Company 800*l.*, and Glasgow and London 700*l.*, and to follow their settlements. The North British and Mercantile have 2500*l.* and London and Lancashire 2000*l.* on building and fixtures."

The policy was subscribed by the defendant and other underwriters. The property described in the policy having been destroyed or damaged by fire to the amount of 1500*l.*, the plaintiff brought this action against the defendant for payment of his proportion of the loss.

The substantial defence to the action was that there had been a breach of the warranty in the Lloyd's policy, more especially with regard to the policy of the Union Company, inasmuch as the rate, terms, and interest in that policy were not "identical" with those in the Lloyd's policy, the rate or premium in the Union policy being 31*s.* 6*d.* instead of 25*s.*, and the "interest" insured being different, the sum insured by the Union policy being split up into separate sums on separate "interests," or, in other words, upon separate sets of chattels; the wording of the policies being also different.

The learned judge directed judgment to be entered for the plaintiff.

The defendant appealed.

1892. Dec. 10. *Finlay, Q.C.*, and *T. W. Chitty*, for the defendant. The expression "warranted" in the policy subscribed by the defendant had the effect of making the clause in which it occurred a condition precedent to the existence of any obligation on the defendant's part; and there was a breach of such condition which avoided the policy. [They cited *Behn* v. *Burness* (1); *Thomson* v. *Weems* (2); *Sillem* v. *Thornton* (3); *Anderson* v. *Fitzgerald* (4); *Newcastle, &c., Co.* v. *Macmorran.* (5)]

Cohen, Q.C., and *Wood Hill*, for the plaintiff. The expression "warranted" had no greater effect than that of making the clause a collateral stipulation, the non-performance of which did not avoid the policy, but only added something not necessarily involved in the contract itself, and gave rise to a right of action, counter-claim, set-off, or reduction in the amount payable.

LINDLEY, L.J. I cannot agree with the view taken by the learned judge of the construction of this document. The real question is, what is the object of the insertion of this clause of warranty? The policy is a fire policy on certain property at 25*s.* per cent. It is subscribed by the defendant and other underwriters, and we find this clause in it: "Warranted to be on same rate, terms, and identical interest as Union Insurance Company

(1) 3 B. & S. 751.
(2) 9 App. Cas. 671.
(3) 3 E. & B. 868.
(4) 4 H. L. C. 484.
(5) 3 Dow. 255, at p. 262.

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800*l.*, and Glasgow and London 700*l.*, and to follow their settlements." Then two other companies have insured the buildings and fixtures. This is not a policy on buildings and fixtures, as I understand it.

It appears to me that the clause can have only one object, and that is this: "We will insure provided we are satisfied that the Union and the Glasgow have insured at the same rate, the same terms, and the same interest." I do not profess to understand what the word "terms" means: I suppose it means terms as to risk; it cannot mean terms which are immaterial for the purpose of the contract. It seems to me that what was contemplated was the risk. What, I apprehend, the underwriters mean is this: "Satisfy us that these two offices have insured the same risk, the same interest, at the same rate, and we will effect this insurance." I cannot myself think that the term "warranted" is important; for I should construe this policy in precisely the same way whether the word was in or not. I do not think the policy is made plainer by the introduction of that word. I look upon part of the clause as a condition precedent. The insurance is "to be on the same rate, terms, and interest" as the two companies which are named. I regard that part as a condition precedent to the incurring of any liability at all. The remainder of the clause is a condition subsequent.

Now, unless the clause is so read, in what position would the underwriters find themselves? They would then find that they had come under an obligation, and that they were thrown back upon a cross-action against the insured. Did either the plaintiff or the underwriters mean that? Was that the object of inserting such a clause? When you have a clause which is consistent with the ordinary habits of men if you interpret it one way, and which is utterly inconsistent with their ordinary habits if you interpret it another, I prefer the former interpretation, that is, supposing the language admits of a double interpretation. I cannot help thinking that the more one looks at this document the more plainly it appears that the bargain entered into by the underwriters was this: "We will not insure except upon the terms that these two companies have done—upon the same rate, upon the same terms, whatever they may be, and on the same

interest." I think, therefore, that the learned judge has arrived at a wrong decision, and that the defendant's contention is right. Judgment must, therefore, be entered for the defendant, with costs both here and below.

BOWEN, L.J. I am entirely of the same opinion, and I confess that the matter appears to me to be quite clear. I do not mean to say that the words of this clause of warranty are happily chosen, but I think the true meaning of the clause is really transparent. The object of this clause is to have other companies or underwriters in the same boat as regards the particular interest and the risk to be covered; and the clause is one which is intended unquestionably for the protection of the underwriters. When you have arrived at that, it seems to me you have arrived at half the journey's end, because there can be no adequate protection to underwriters if you relegate them to a cross-action. The clause is intended to protect them against having to pay, not to give them a right to bring an action against the man insuring with them. But the way in which the clause is inserted seems to me to lead to precisely the same conclusion, and to guide one to the same end. The policy is one which, of course, is signed by the underwriters; it is not signed by the person who is insuring with them; and it is expressed in this way: "Warranted to be on same rate, terms, and identical interest as" the two other companies. Now, the words "warranted to be" must mean "guaranteed to be," or "promised to be"; and this document, signed as it is by the underwriters, must mean: "It is a term of our promise that there shall be a guarantee or promise of the other side"; and the guarantee or promise of the other side is then expressed. There are to be the same rate, the same terms, the identical interest, as in the case of the two other companies. It is, therefore, a term of this policy that there should be this promise; and if this promise is one which goes to the root of the whole engagement and transaction, then it becomes, according to the ordinary principles of ordinary law, a condition—either a condition precedent, or, if the condition is one which cannot be construed as a condition precedent and must be a condition subsequent, then it becomes a condition

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subsequent. That arises from the materiality of the promise which is assumed to be made, and the making of which is to be a term of the engagement or transaction into which the underwriter has entered. When you have got as far as that, it is clear that it is the term as regards the risk which is material. A term as regards the risk must be a condition. Then let us look at what the particular words are—the "same rate and identical interest." The "same rate and identical interest" are, obviously, words so material to the transaction that we can only construe them as creating a condition precedent. With regard to the word "terms," it is not necessary for us to decide, or to explain exactly what it means. I do not myself doubt that there is a limitation which can be put upon it—a limitation to be derived from the character of the document, from the nature of the transaction, and from the nature of the stipulation itself, which reduces within defined and reasonable limits that which otherwise might be vague, impracticable, and illimitable. But when you regard the words which alone we have to look at for the purposes of this appeal, the "same rate and identical interest" as the insurance companies, I do not doubt for a moment that it is a condition without which the contract is not to be binding.

With regard to the words "to follow their settlements," that is a condition subsequent, as my brother has said.

The true construction of the document is, in my opinion, that which I have stated; and the opposite view is one which, to my mind, never could be adopted in business, for this reason, that I do not believe that there is an underwriter in the world of any substantial position who would put his hand to a policy in which a term directly affecting the risk was to be enforced only by a cross-action brought on the part of the underwriter against the insured after the loss. The point turns on the materiality of this promise. It is because the promise is so material to the consideration of the risk that it seems to me to become a condition.

A. L. SMITH, L.J. I am of the same opinion, and have but little to add. My brother Wright evidently had considerable

difficulties and doubts upon the point, and I think the decision at which he eventually arrived was wrong.

The question is—whether this clause contains a promise which goes to the root of the transaction, or whether it is merely a collateral stipulation the non-performance of which did not avoid the defendant's obligation, but only gave him a cause of action. We must look to the business of the matter in construing this clause, and I quite agree with what has fallen from Lindley, L.J., that it is immaterial whether the word "warranted" is in the clause or not. For the purposes of my judgment I strike that word out. The question is, what is the promise? Now, to state it as shortly as I can, in my judgment there is an agreement in this policy between the underwriter and the assured that the underwriter shall insure provided that only the same risk which the other two offices have undertaken is placed upon him—the reason being that he knows those offices, and the risk they have undertaken he is content to abide by. If, however, the other two offices have not undertaken the same risk as that underwritten by the defendant, then, it being a condition of this policy that those two offices should have undertaken the same risk, there is no liability on the part of the underwriter if this is not so.

I am of opinion that this clause constitutes a condition and not a collateral agreement, and that the defence is a good one.

Appeal allowed.

Solicitors: *Waltons, Johnson, Bubb, & Whatton*; *A. R. Chamberlayne.*

G. I. F. C.

1892
Nov. 19;
Dec. 12.

WATTEAU *v.* FENWICK.

Principal and Agent—Liability of Principal—Undisclosed Principal—Unauthorized Acts of Agent.

The defendants, a firm of brewers, who were the owners of the business of a beerhouse, appointed a manager of the business; the licence was always taken out in the name of the manager, whose name also appeared over the door. By the agreement between the defendants and their manager, the latter was forbidden to purchase certain articles for the purpose of the business, which were to be supplied by the defendants; but the manager, in contravention of his instructions, ordered such articles from the plaintiff for use in the business; the plaintiff supplied the goods and gave credit for them to the manager only. Subsequently, upon discovering that the defendants were the real owners of the business, the plaintiff sued them for the value of the goods:—

Held, that the plaintiff was entitled to maintain the action, for the defendants, as the real principals, were liable for all acts of their agent which were within the authority usually conferred upon an agent of his particular character, although he had never been held out by the defendants as their agent, and although the authority actually given to him by them had been exceeded.

Appeal from the decision of the county court judge of Middlesborough.

From the evidence it appeared that one Humble had carried on business at a beerhouse called the Victoria Hotel, at Stockton-on-Tees, which business he had transferred to the defendants, a firm of brewers, some years before the present action. After the transfer of the business, Humble remained as defendants' manager; but the licence was always taken out in Humble's name, and his name was painted over the door. Under the terms of the agreement made between Humble and the defendants, the former had no authority to buy any goods for the business except bottled ales and mineral waters; all other goods required were to be supplied by the defendants themselves. The action was brought to recover the price of goods delivered at the Victoria Hotel over some years, for which it was admitted that the plaintiff gave credit to Humble only: they consisted of cigars, bovril, and other articles. The learned judge allowed the claim for the cigars and bovril only, and gave judgment for the plaintiff for 22*l.* 12*s.* 6*d.* The defendants appealed.

1892. Nov. 19. *Finlay, Q.C.* (*Scott Fox*, with him), for the defendants. The decision of the county court judge was wrong. The liability of a principal for the acts of his agent, done contrary to his secret instructions, depends upon his holding him out as his agent—that is, upon the agent being clothed with an apparent authority to act for his principal. Where, therefore, a man carries on business in his own name through a manager, he holds out his own credit, and would be liable for goods supplied even where the manager exceeded his authority. But where, as in the present case, there is no holding out by the principal, but the business is carried on in the agent's name and the goods are supplied on his credit, a person wishing to go behind the agent and make the principal liable must shew an agency in fact.

[LORD COLERIDGE, C.J. Cannot you, in such a case, sue the undisclosed principal on discovering him?]

Only where the act done by the agent is within the scope of his agency; not where there has been an excess of authority. Where any one has been held out by the principal as his agent, there is a contract with the principal by estoppel, however much the agent may have exceeded his authority; where there has been no holding out, proof must be given of an agency in fact in order to make the principal liable.

Boydell Houghton, for the plaintiff. The defendants are liable in the present action. They are in fact undisclosed principals, who instead of carrying on the business in their own names employed a manager to carry it on for them, and clothed him with authority to do what was necessary to carry on the business. The case depends upon the same principles as *Edmunds* v. *Bushell* (1), where the manager of a business which was carried on in his own name with the addition "and Co." accepted a bill of exchange, notwithstanding a stipulation in the agreement with his principal that he should not accept bills; and the Court held that the principal was liable to an indorsee who took the bill without any knowledge of the relations between the principal and agent. In that case there was no holding out of the manager as an agent; it was the simple case of an agent being allowed to act as the ostensible principal without any

(1) Law Rep. 1 Q. B. 97.

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disclosure to the world of there being any one behind him. Here the defendants have so conducted themselves as to enable their agent to hold himself out to the world as the proprietor of their business, and they are clearly undisclosed principals: *Ramazotti* v. *Bowring*. (1) All that the plaintiff has to do, therefore, in order to charge the principals, is to shew that the goods supplied were such as were ordinarily used in the business —that is to say, that they were within the reasonable scope of the agent's authority.

[He also cited *Yorkshire Banking Co.* v. *Beatson*. (2)]

Finlay, Q.C., in reply, cited *Summers* v. *Solomon*. (3)

Cur. adv. vult.

Dec. 12. LORD COLERIDGE, C.J. The judgment which I am about to read has been written by my brother Wills, and I entirely concur in it.

WILLS, J. The plaintiff sues the defendants for the price of cigars supplied to the Victoria Hotel, Stockton-upon-Tees. The house was kept, not by the defendants, but by a person named Humble, whose name was over the door. The plaintiff gave credit to Humble, and to him alone, and had never heard of the defendants. The business, however, was really the defendants', and they had put Humble into it to manage it for them, and had forbidden him to buy cigars on credit. The cigars, however, were such as would usually be supplied to and dealt in at such an establishment. The learned county court judge held that the defendants were liable. I am of opinion that he was right.

There seems to be less of direct authority on the subject than one would expect. But I think that the Lord Chief Justice during the argument laid down the correct principle, viz., once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies—that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that

(1) 7 C. B. (N.S.) 851. (2) 4 C. P. D. 204; 5 C. P. D. 109.
(3) 7 E. & B. 879.

character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority—which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so. Otherwise, in every case of undisclosed principal, or at least in every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent and then discovering that he was an agent and had a principal.

But in the case of a dormant partner it is clear law that no limitation of authority as between the dormant and active partner will avail the dormant partner as to things within the ordinary authority of a partner. The law of partnership is, on such a question, nothing but a branch of the general law of principal and agent, and it appears to me to be undisputed and conclusive on the point now under discussion.

The principle laid down by the Lord Chief Justice, and acted upon by the learned county court judge, appears to be identical with that enunciated in the judgments of Cockburn, C.J., and Mellor, J., in *Edmunds* v. *Bushell* (1), the circumstances of which case, though not identical with those of the present, come very near to them. There was no holding out, as the plaintiff knew nothing of the defendant. I appreciate the distinction drawn by Mr. Finlay in his argument, but the principle laid down in the judgments referred to, if correct, abundantly covers the present case. I cannot find that any doubt has ever been expressed that it is correct, and I think it is right, and that very mischievous consequences would often result if that principle were not upheld.

In my opinion this appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Belfrage & Co., for Bainbridge & Barnley, Middlesborough.*

Solicitors for defendants: *Johnson, Weatherall, & Sturt, for Marshall, Sunderland.*

(1) Law Rep. 1 Q. B. 97.

W. J. B.

C. A.
1893
Jan. 31.

[IN THE COURT OF APPEAL.]

ELLIS *v.* GOULTON AND ANOTHER.

Principal and Agent—Sale of Real Property—Payment of Deposit to Solicitor as Agent—Action to recover Deposit from Agent.

On the sale of premises by auction the purchaser paid a deposit to the vendor's solicitor as agent for the vendor. The sale went off through the default of the vendor, and the purchaser brought an action to recover the deposit from the solicitor:—

Held, that the payment of the deposit to the solicitor was equivalent to payment to the vendor, and that the action could not be maintained.

APPLICATION to set aside the judgment entered for one of the defendants, Jackson.

The action was brought to recover back a deposit of 100*l.* paid by the plaintiff on the purchase of certain freehold property. The defendant Goulton was the vendor of the property, and the defendant Jackson acted as his solicitor. The sale was by auction, and was made under certain conditions of sale, one of which was that the purchaser of each lot should, immediately after the sale of that lot to him, pay a deposit of 10*l.* per cent. in part payment of the purchase-money into the hands of the vendor's solicitor as agent for and on account of the vendor, and should sign the contract to purchase attached to the conditions. The plaintiff purchased one lot for 1000*l.*, and signed the following memorandum: "I, Edmund Ellis . . . having at the sale thereof this day been declared the purchaser of the property comprised in lot 19 in the above particulars, and having paid the sum of 100*l.* as a deposit and in part payment of the purchase-money on account thereof, hereby agree to complete the purchase in accordance with the foregoing conditions of sale." The defendant Jackson signed the following memorandum: "As agent for the above-named vendor, I ratify this sale to the above-named purchaser, and acknowledge the receipt from him of the said sum of 100*l.*" The vendor being unable to make a title to the property rescinded the contract. The deposit not having been returned to the plaintiff, he brought this action to recover it against Goulton the vendor and Jackson his

solicitor. At the trial it was submitted that the deposit could not be recovered from Jackson, who was acting as agent for the vendor, and that the state of accounts between him and the vendor entitled him to retain it, even if there had been, as alleged, a direction to him from Goulton to pay it over to the plaintiff. The learned judge who tried the case ruled that Jackson, to exonerate himself from liability to pay the money to the plaintiff, must shew either that he had paid it to Goulton, or had received an express direction from him to expend the money on his behalf, and, failing this, he held that the plaintiff was entitled to recover it from Jackson, and gave judgment accordingly.

The defendant Jackson appealed.

Finlay, Q.C., and *H. Tindall Atkinson*, in support of the appeal. The receipt of the deposit by Jackson, as agent for Goulton, was a receipt by the latter. There was no privity between the purchaser and Jackson, and the latter is not liable in an action by the former to recover the deposit.

[They cited: *Edgell* v. *Day* (1); *Bamford* v. *Shuttleworth* (2), and *Stephens* v. *Badcock*. (3)]

Channell, Q.C., and *T. Willes Chitty*, contrà. The case stands as if the money had been paid to Goulton and handed to Jackson, to be returned to the plaintiff in a certain event. Goulton has never demanded the money of Jackson, and the plaintiff now has a general property in it, and can follow it in the hands of the person who holds it, and, after demand, sue for it: *In re Hallett's Estate, Knatchbull* v. *Hallett*. (4) Jackson delivered an account to Gulton, but did not bring this money into the account, and that is strong evidence that he was holding it for the plaintiff, should he prove entitled to it.

LORD ESHER, M.R. In this case, the defendant Goulton had real property to sell, and put it up to auction; and the other defendant, Jackson, who was his solicitor, managed the putting up of the property for sale, and was the intermediary between the vendor and the vendees. There were conditions of sale to be

(1) Law Rep. 1 C. P. 80.
(2) 11 Ad. & E. 926.
(3) 3 B. & Ad. 354.
(4) 13 Ch. D. 696.

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observed by the purchasers, and one of them was that a purchaser should pay a deposit. In some cases, such a deposit is paid to the auctioneer; and it has been held that, in such a case, the auctioneer receives the deposit on behalf of both vendor and purchaser, to hand it over to one or the other, according to the event, and is, in fact, in the position of a stakeholder. In this case, the condition was to pay the deposit to the solicitor Jackson, as agent for and on account of the vendor; so that by the very terms of the condition the vendee was to pay the money, not to a person who could be agent for him, but to the vendor's agent, who was to receive it for his principal. The plaintiff, who purchased part of the property, accordingly paid the deposit to Jackson, and got from him a receipt, in which he purported to receive the money as agent for the vendor. Subsequently, the vendor failed to make out a title to the property, so that as between him and the purchaser the latter became entitled to have the deposit paid back to him. He now sues Jackson, who never had any relationship to him as his agent, to recover the deposit from Jackson. In the first place, it cannot be said that Jackson was in any respect trustee for the plaintiff; there was nothing in the circumstances to raise any trust. There was no relation of principal and agent, and no bailment as between the plaintiff and Jackson; and I have asked in vain for any authority to shew that there was any fiduciary relation between these parties. The cases cited draw the distinction between a stakeholder and an agent for one of the parties; the former is the agent of both, but the latter is the agent of one only, and responsible only to that one. The question of following the money has nothing to do with the decision of this case, for it can only arise where there is the fiduciary relation, which does not exist here.

I find myself unable to agree with the decision of the learned judge, and the appeal must be allowed and judgment entered for the defendant.

BOWEN, L.J. I am of the same opinion. When a deposit is paid by a purchaser under a contract for the sale of land, the person who makes the payment may enter into an agreement

with the vendor that the money shall be held by the recipient as agent for both vendor and purchaser. If this is done, the person who receives it becomes a stakeholder, liable, in certain events, to return the money to the person who paid it. In the absence of such agreement, the money is paid to a person who has not the character of stakeholder; and it follows that, when the money reaches his hands, it is the same thing so far as the person who pays it is concerned as if it had reached the hands of the principal. If so, it is impossible to treat money paid under these circumstances and remaining in the hands of the agent as there under any condition or subject to any trust in relation to the payer. The solicitor of the vendor is, unless the contrary has been agreed on, the agent of the vendor to receive a deposit on his behalf. The three cases of *Edgell* v. *Day* (1); *Bamford* v. *Shuttleworth* (2), and *Duke of Norfolk* v. *Worthy* (3), abundantly shew this, and carry us back as far as the time of Lord Ellenborough.

It is sought to escape from this conclusion by saying that this is a case in which the money can be followed. The answer to that is that in the present case there is no fiduciary relation between the payer and the recipient of the money, and that money received by the latter would not be held under any trust to return that specific money in certain events, but under a contract to pay the equivalent of such money. There is another answer, which is, that this money was not kept separate, but, on the contrary, it had been spent for the benefit of the principal on a request by him which the law would imply. Thus, even if the equitable doctrine, as to following the money, could be applied in any such case, it could not be applied here, because the fund to which it is sought to apply it has no separate existence.

I am unable to follow the distinction which the learned judge appears to have drawn between the case of money paid by the agent to his principal and the case of money spent at his principal's request. In any case I am of opinion that the payment of the money to the solicitor was equivalent to payment

(1) Law Rep. 1 C. P. 80. (2) 11 Ad. & E. 926.
(3) 1 Camp. 337.

C. A. 1893

ELLIS v. GOULTON.

to his principal, and that the money cannot be recovered from the solicitor, whether he has paid it over to his principal or not.

A. L. SMITH, L.J. It seems to me that as soon as it is admitted that Jackson received the money as agent for the vendor, and not as stakeholder, the matter is determined. The plaintiff has no ground on which he can succeed in getting back the money from Jackson. He cannot sue in contract, nor in trover or detinue, for the money is not in specie or set apart in a bag, and the plaintiff has no equitable right as against Jackson. It is said that Goulton, the vendor, stood in a fiduciary position with regard to this deposit, and that therefore the plaintiff could follow the money into the hands of Jackson, and *In re Hallett's Estate* (1) is cited in support of this view, which however must fail, because no such fiduciary relation exists. Further, as a matter of fact, the money did not remain in Jackson's possession, so that there is nothing which the plaintiff can follow in his hands.

Appeal allowed. Judgment entered for the defendant Jackson.

Solicitors for plaintiff: *Harvey & Capron, for Kenyon & Son; Thorne, York.*

Solicitor for defendant: *Stanley Evans.*

(1) 13 Ch. D. 696.

A. M.

JAMES *v.* MASTERS.

1892
Nov. 17.

Local Government — By-laws—New Building—Deposit of Plan—Deviation from Plan.

By one of the by-laws of an urban sanitary authority, made under s. 157 of the Public Health Act, 1875, every person intending to erect a building was required to give to the sanitary authority notice in writing of such intention, and at the same time to deliver or send to the clerk or surveyor complete plans and sections of every floor of the intended building, shewing the position, form, and dimensions of the several parts of the building. Another by-law empowered the sanitary authority to remove, alter, or pull down work done in contravention of any by-law relating to new buildings; but there was no by-law directed against persons building contrary to deposited plans.

The respondent gave notice to the urban sanitary authority of his intention to build a house, and sent in plans, which were approved. During the progress of the building he made substantial alterations or deviations from the plans, which chiefly consisted in diminishing the height of certain of the floors; but such alterations did not contravene any of the by-laws, there being no by-law regulating the height of rooms in new buildings. The respondent was summoned on a charge of erecting a building without sending in complete plans and sections of every floor as required by the by-laws. The justices dismissed the summons:—

Held, that as the erection of the building was no longer proceeding in accordance with the deposited plans, the respondent was bound to send in fresh plans in accordance with the change in his intention, and, having omitted to do so, was liable to be convicted.

Case stated by justices for the county of Glamorgan, from which the following facts appeared:—

The appellant, the clerk to the Merthyr Tydfil Local Board, had taken out a summons against the respondent charging that on May 17, 1892, he "did erect a building within the district of the Merthyr Tydfil sanitary authority, without sending to such authority or their clerk or surveyor complete plans and sections of every floor of such building as required by the by-laws of the said authority." The proceedings were taken under the 93rd by-law, which provides that "every person who shall intend to erect a building shall give to the sanitary authority notice in writing of such intention . . . . and shall at the same time deliver or send, or cause to be delivered or sent, to their clerk at his or their office, or to their surveyor at his or their office,

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complete plans and sections of every floor of such intended building, which shall be drawn to a scale of not less than one inch to every eight feet, and shall shew the position, form, and dimensions of the several parts of such building. . . . ." The by-law then goes on to provide for the sending of a description of the materials to be used, and of the mode of drainage and the means of water supply, together with a block plan of the building shewing the drainage arrangements, &c.

From the evidence, which was set out in the case, it appeared that on August 1, 1891, the respondent sent in plans of certain proposed buildings to the sanitary authority, which, however, were not approved; and on December 14, 1891, fresh plans were submitted, which were approved, and upon which the respondent proceeded to erect his buildings. The buildings as erected deviated from the plans, the height both of the first and second floor being six inches less than shewn on the plans, and the total height of the buildings nine feet less. The by-laws had been made under s. 157 of the Public Health Act, 1875, which does not empower a local authority to make by-laws regulating the height of rooms intended for human habitation, and the sanitary authority had not availed themselves of the power to make such by-laws conferred upon urban authorities by s. 23 of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59); there was, therefore, no by-law regulating the heights of rooms in buildings within the district of the sanitary authority. The justices found as facts (inter alia) that the buildings as erected deviated from the plans approved of, the deviations consisting in the height of two of the floors being reduced from 10 ft. 6 in. to 10 ft., and in a portion of the attic being made smaller, but that none of the deviations infringed the by-laws of the board; and they decided that plans had been duly deposited and passed as required by by-law 93, and that there had been no breach of that by-law, and dismissed the summons.

The contention before the justices on behalf of the appellant was that the buildings, not being strictly in accordance with the plans, were therefore not the buildings indicated by the plans which had been submitted, and were, therefore, being erected without plans for them having been deposited.

For the respondent it was contended, that although the buildings deviated from the deposited plans, yet there was no offence against by-law 93, unless such deviations were contrary to the by-laws of the board.

Upjohn, for the appellant. The decision of the justices was wrong; it amounts to a decision, as they themselves admitted, that a builder need not follow the deposited plans, but may build a wholly different building, provided that in so doing he is not guilty of any positive infringement of any particular by-law. The building actually erected is not the same building as the building intended at the time of the deposit of the plans, and, therefore, it is being erected without the proper plans having been deposited in respect of it. There is no other by-law that meets the case; for by-law 100, which was suggested to be in point in the Court below, only empowers the board to take the necessary steps for removing, altering, or pulling down work done in contravention of any by-law, not work done contrary to the deposited plans.

The respondent did not appear.

LORD COLERIDGE, C.J. I am of opinion that this case must go back to the justices with an intimation that they ought to convict the respondent. The by-laws require that buildings should be erected in accordance with a proper plan. In the present case a plan was deposited; but in the course of the execution of the works the respondent changed his mind, and made substantial alterations in the buildings he was erecting. These alterations may have been proper and right in themselves—as to that I say nothing—and if submitted to the local board they might have been approved. I assume all that was done by the respondent to have been done bonâ fide, and the change in the buildings to have been made bonâ fide on his part; but still the judgment of the local board, as being the urban sanitary authority, ought to have been taken on the alterations; otherwise it might be that a person might deposit plans which he had no intention of carrying into effect, and when charged with having made alterations in the buildings, might reply that he had

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fulfilled the by-law and that the justices had no jurisdiction to entertain a complaint against him. I cannot think that such a case as I have supposed could possibly be allowed. I think that this case must be treated, not as an alteration merely, but as a case requiring a fresh plan, which ought to have been submitted to the local board. It is true that the alterations made may not contravene any by-law, but the requisite plans have not been submitted to the board under by-law 93, and I think the respondent is liable to a penalty for his failure to submit them. The justices have given no satisfactory reason for refusing to convict.

WILLS, J. I am of the same opinion. I was at first disposed to think that the case required another by-law to meet it. But the provisions of by-law 100 are not directed against building contrary to deposited plans, but contrary to a by-law, and it does not touch this case. When there is a substantial alteration of the plans, it must be preceded by an intention to alter. The former plans cease to be plans of the intended building, and there are therefore no plans of the intended building deposited. If he proceeds therefore with the building as altered, he builds without having deposited plans of his intended building and the by-law is broken. The view of the justices seems to me erroneous, and (if they will pardon me for saying so) mischievous; it amounts to nothing less than this, that there may be an alteration (if made bonâ fide) of the whole of a proposed building, provided that the alterations do not contravene the specific regulations of any by-law.

Case remitted to justices.

Solicitors for appellant: *Schultz & Son, for Gwilym C. James, Merthyr Tydfil.*

W. J. B.

THE MAYOR, &c., OF SOUTHPORT *v.* MORRISS. 1893 *Jan.* 25.

Ship—Merchant Shipping Acts—Passenger Steamer—"Vessel used in Navigation"—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 2, 303, 318.

By s. 318 of the Merchant Shipping Act, 1854, "If any passenger steamer plies . . . with any passengers on board without having one of the duplicates (of her Board of Trade certificate) put up in some conspicuous part of the ship," the owner shall be liable to a penalty. And by s. 2 of the same Act, "'ship' shall include every description of vessel used in navigation not propelled by oars."

A launch was used for the purpose of carrying passengers on pleasure trips round an artificial lake half a mile long by 180 yards wide, without having any duplicate of a Board of Trade certificate put up in her:—

Held, that the launch, while so used on a sheet of water of that size, was not a vessel used in navigation, and, therefore, not a passenger steamer within the meaning of s. 318.

CASE stated by justices.

The appellants were the owners of an artificial lake, half a mile long by 180 yards wide, situated on the foreshore in the borough of Southport. The lake, which had been excavated from the sand to a depth of three feet, was surrounded by a concrete wall, and was not open to the sea except at high spring tides. The lake was used for boating purposes, and the appellants had placed on it for hire a certain vessel, or launch, of about three tons burthen, which was propelled by electricity from accumulators charged by a dynamo from a charging station. (1) The launch had not been registered as a British ship under the provisions of the Merchant Shipping Act, 1854, and no Board of Trade certificate had ever been issued to it under s. 112 of that Act. On August 10, 1892, the launch, with between thirty and forty passengers on board, proceeded from the landing stage of the lake on a trip round the lake and back again to the landing stage. Each of such passengers had paid to the appellants a fare for such trip. On these facts an information was laid

(1) By s. 5 of the Merchant Shipping Act, 1889 (52 & 53 Vict. c. 46): "The provisions of the Merchant Shipping Act, 1854, and the Acts amending the same, with respect to steamships, shall apply to ships propelled by electricity."

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against the appellants for having unlawfully allowed their launch to ply with more than twelve passengers on board without having the duplicate of a certificate issued by the Board of Trade put up in some conspicuous part of the vessel, as required by s. 318 of the Merchant Shipping Act, 1854. The justices held that the launch was a passenger steamer plying with passengers within the meaning of the above section, and convicted the appellants, subject to a case for the opinion of the Court.

F. W. Raikes, (*F. W. Kingdon*, with him), for the appellants. A vessel of this description is not within the provisions of s. 318. That section by its very terms applies only to passenger steamers of such a size that they can be called "ships," and it would be an abuse of language to apply the term ship to a launch of three tons burthen. Secondly, this launch, apart from the consideration of its size, cannot be said to be a ship having regard to the place where it is used. For a vessel, to be a ship, must, according to the definition clause, be "used in navigation" and no one would speak of navigating a pond of this size. Thirdly, assuming that the launch is a passenger steamer within the Act, it did not "ply" within the meaning of s. 318. Plying involves the idea of two termini, whereas here there was but one landing stage, and the boat simply went round the lake, returning to the point from which it started.

Sir Charles Russell, A.G. (*H. Sutton*, with him), for the respondent. The object of s. 318 was to prevent accidents arising from the overcrowding of passengers, or from defective machinery. But such accidents might as well happen on a sheet of water of these dimensions as on the sea. Probably a considerable proportion of the passengers would be children, and three feet of water is enough to drown a child. If this piece of water is not within the Act, where is the line to be drawn? Sect. 303 defines "passenger steamer" to include "every British steamship carrying passengers to, from, or between any place or places in the United Kingdom, excepting steam ferry boats working in chains, commonly called steam bridges." That definition shews that in considering whether a

vessel is a "passenger steamer," the fact that she is used in a confined area is perfectly immaterial, for it imports that, but for the exception, it would include a boat fastened to the bank by chains. Then as regards the size of the launch, the expression "ship" includes "every description of vessel used in navigation," irrespective of its size, provided it is not propelled by oars. That continued to be the only qualification down to the passing of the Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), which by s. 16 provided that "any passenger steamer may carry passengers not exceeding twelve in number, although she does not carry a Board of Trade certificate, as provided by the Merchant Shipping Act, 1854, with regard to passenger steamers." That section does not apply here, for the vessel carried more than twelve passengers, but it goes to shew that the Act of 1854 was intended to apply to all passenger steamers however small.

Raikes, in reply. Sect. 16 of the Act of 1876 had nothing to do with the size of vessels. Before that Act, if a single person was carried as a passenger on board a ship which was not a regular passenger ship, he had to be entered on the ship's books in order to avoid the necessity of a survey. The section was passed for the purpose of getting rid of that inconvenience.

LORD COLERIDGE, C.J. I am of opinion that this appeal must be allowed. The launch in question cannot be held to be within the provisions of s. 318 unless it can be said to be a ship, for the section requires the duplicate certificate to be put up in a conspicuous part of the *ship*. And by s. 2 the term "ship" is defined to include "every description of vessel used in navigation not propelled by oars." We are therefore reduced to the question whether this launch was a vessel used in navigation. I think that, having regard to the size of the sheet of water on which it was used, it was not. Navigation is a term which, in common parlance, would never be used in connection with a sheet of water half a mile long. The Attorney-General has asked where we are to draw the line. The answer is that it is not necessary to draw it at any precise point. It is enough for us to say that the present case is on the right side of any reasonable line that could be drawn.

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CHARLES, J. I am of the same opinion. I agree with my Lord that this launch, used in the place in which it was used, was not a vessel used in navigation within s. 2 of the Merchant Shipping Act, 1854, and therefore not a passenger ship within the meaning of ss. 303 and 318.

Appeal allowed.

Solicitors for appellants: *Andrew Miller & Smith, for Town Clerk, Southport.*

Solicitor for respondent: *Solicitor to the Board of Trade.*

J. F. C.

1893

Jan. 26.

O'HARA, MATTHEWS & CO. *v.* ELLIOTT & CO.

Practice—Costs—Taxation—Refresher Fees to Counsel—Order LXV., *r.* 27, *sub-r.* 48.

By Order LXV., r. 27, sub-r. 48, where a cause is tried on vivâ voce evidence in open Court, "if the trial shall extend over more than one day, and shall occupy either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours without being concluded, the taxing officer may allow, for every clear day subsequent to that on which the five hours have expired, the following fees," &c.

The trial of a cause extended over parts of two days, and occupied four hours and a half on the first day, and five hours on the second day. Upon taxation of costs as between party and party, the master disallowed refresher fees to the successful party's counsel in respect of the second day:—

Held, that refresher fees ought to have been allowed in respect of the second day, because the trial was substantially prolonged on that day beyond the time necessary to make up the five hours mentioned in the sub-rule, and the work done by counsel after the expiration of such five hours, was done on a "clear day" within the meaning of the sub-rule.

The Courier ([1891] P. 355) followed.

Walker v. *Crystal Palace District Gas Co.* ([1891] 2 Q. B. 300) not followed.

APPEAL from the decision of a master, referred to the Divisional Court by Wright, J.

In an action in the Queen's Bench Division, tried before Lawrance, J., with a jury, at the Guildhall, the plaintiffs obtained judgment with costs. The case was left part heard at the end of the day on which it came on for trial, and was concluded on the following day. The trial occupied four hours and a half on the first day, and five hours on the second day. Upon the

taxation of the plaintiffs' costs as between party and party, the master declined to allow refresher fees to the plaintiffs' counsel in respect of their attendance on the second day.

The plaintiffs appealed.

Trevor White, for the plaintiffs. The master ought to have allowed refresher fees to counsel on the second day. When the five hours were made up on that day, the subsequent hearing was a hearing on a "clear day" within Order LXV., r. 27, sub-r. 48. When you have made up one day of five hours by adding time from the second day, and there is a further sitting on that day which occupies a substantial time, then refresher fees ought to be allowed, because work is done on a day clear of the other day of five hours. It is submitted that the decision in *Walker* v. *Crystal Palace District Gas Co.* (1) was wrong, and it is in conflict with the decision of Butt, J., in *The Courier* (2), of Grantham, J. (after consultation with another judge), in *Gibbs* v. *Barrow* (3), and of Chitty, J., in *Collins* v. *Worley*. (4) The second part of the sub-rule is in favour of the construction contended for; because, after stating the refresher fees which may be allowed in cases within the first part, when the evidence is taken vivâ voce, the sub-rule proceeds: "The like allowances may be made where the evidence in chief is not taken vivâ voce, if the trial or hearing shall be substantially prolonged beyond such period of five hours, to be so computed as aforesaid, by the cross-examination of witnesses whose affidavits or depositions have been used."

Wildey Wright, for the defendants. The true construction of the sub-rule is clear. The words "every clear day subsequent to that on which the five hours shall have expired" refer to a day of the week separate from the day on which the five hours expire. The second part of the sub-rule is meant to create a difference between cases in which the evidence is taken vivâ voce and cases in which it is taken otherwise. The words in the second part, "if the trial on hearing shall be substantially prolonged beyond such period of five hours," do not affect the

(1) [1891] 2 Q. B. 300.
(2) [1891] P. 355.
(3) 30 Sol. J. 538.
(4) 60 L. T. 748.

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construction of the first part. The decision in *Walker* v. *Crystal Palace District Gas Co.* (1) should be followed.

DAY, J. I quite agree with what the late Sir Charles Butt said in *The Courier* (2), that the case before him was not altogether free from difficulty. I go further, and say that this case presents very great difficulty. I am not wholly satisfied that the construction which I am about to put upon Order LXV., r. 27, sub-r. 48, is the right one; but still, I think any other construction would lead to so much inconvenience and injustice, and would be so opposed to the traditional usage of the profession, that I am fully justified in adopting the subtle construction which has been suggested by my brother Collins. That construction seems to me sound, and calculated to avoid the mischief which would result from the view taken of the sub-rule in *Walker* v. *Crystal Palace District Gas Co.* (1) I am of opinion that the sub-rule, the language of which is peculiar, does not exclude the right to refreshers, where a case is prolonged on the second day of the hearing, after the expiration of the five hours. The object was to prevent refreshers being allowed where the trial has occupied a short space of time on the first day, and the case runs into the second day, and finishes in a short time on that day. The notion seems to have been to regulate the length of the first day in estimating the number of days the case lasted. It is difficult to put any other satisfactory construction upon the sub-rule; any other construction would be inconvenient, not in accordance with the old usage of the profession, and not in accordance with the requirements of sound reason. Sub-rule 48 provides that, "as to refresher fees, where any cause or matter is to be tried or heard upon vivâ voce evidence in open Court, if the trial shall extend over more than one day, and shall occupy"—here the length of the first day is regulated—"either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing officer may allow, for every clear day subsequent to that on which the five hours shall have expired," refresher fees. The first day, therefore, may be made

(1) [1891] 2 Q. B. 300. (2) [1891] P. 355.

out by taking five hours, expiring either on the first or on a subsequent day or days. Now, what is meant by "clear day"? It means, in my opinion, a day such as is spoken of before, namely, another day. It is a day clear and distinguishable from the day of five hours. If you have to borrow from the second day in order to make up the five hours for the first day, then you must have something more on the second day. You cannot begin to earn refresher fees until you have made up the five hours. Take a case which begins on Monday and occupies two hours on that day—you are not entitled to refresher fees until you have worked three hours on the Tuesday, and then you begin your clear day. It is a day clear of the incubus of the five hours. This, I understand, was the view taken by Sir Charles Butt in *The Courier*. (1) He pointed out the difficulty of reconciling the construction adopted in *Walker* v. *Crystal Palace District Gas Co.* (2) with the latter part of the sub-rule. I agree with that view. I think he must have given the same meaning to the words "clear day" as I have suggested. I am of opinion, therefore, that the decision of the master was wrong, and this appeal ought to succeed.

Collins, J. I am of the same opinion. It is really difficult to construe sub-rule 48 so as to give it the effect which the legislature intended. There are, however, some things which help us in construing it by enabling us to gather what the intention was. It seems to have been intended that a person, in order to entitle himself to refresher fees, must shew, in the first instance, that he has attended five hours, whether upon the first day only, or upon that and another day. The five hours represents the full day, and one would suppose that after the full day was completed work done afterwards would entitle counsel to refresher fees. One would suppose that after the five hours were made up it was intended to allow refresher fees for work done subsequently on each day. I think that intention can be got out of the sub-rule. The primary object was to ensure that five hours' work should be done before counsel were entitled to refresher fees. Suppose that the five hours were exhausted on the first day—then it may be taken to have

(1) [1891] P. 355. (2) [1891] 2 Q. B. 300.

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been the intention that counsel, if they attended longer than five hours on that day, must be content with the brief fees. If they attend for five hours on the first day, and the sitting is prolonged for two hours more on that day, then they cannot point to a clear day, because they can only point to one day of the week. The question is, Can you point to a day clear of the day when the five hours was made up? Suppose the five hours has to be made up by taking time from the second day; suppose when you have made up the five hours on the second day you work four hours more on that day, then counsel may say: "I point to a day in the week on which I did work after the five hours were made up. If I could only shew five hours' work in the two days, then I could not shew that the second day was a clear day, because it was not clear of the obligation to borrow time from the preceding day in order to make up the five hours. But if I can shew that I did work on a day of the week clear of the necessity of borrowing to make up the five hours, then I can point to it as a clear day within the meaning of the sub-rule." I am of opinion that, where work has been done on the second day after the expiration of the five hours made up by taking time from the second day, the residue of the second is a "clear day" on which work has been done within the meaning of the sub-rule. That construction is made possible having regard to the second clause of the sub-rule, because it seems to shew that the intention was what I have suggested. The second clause only deals with another class of case—namely, where the evidence is taken on affidavits or depositions, and there is a cross-examination orally of witnesses whose affidavits or depositions have been used. That class of case was not included in the first part of the sub-rule, so that it was necessary to deal with it specially; but there is no reason why the legislature should have applied a different rule or measure of time to it, and no indication that any different rule or measure of time was intended to be applied. I think the second clause clearly implies that refresher fees may be allowed where the trial is substantially prolonged beyond the five hours, to be computed as stated in the first clause. The construction which I put upon the rule is certainly a possible one: against it are the opinions of Denman, J., and Wills, J.; whilst in favour of it are those of Sir Charles

Butt, Grantham, J. (after consultation with another judge), and Chitty, J. I, therefore, think that the weight of authority, as well as of common sense, justifies us in adopting that construction.

Appeal allowed.

Solicitor for the plaintiffs: *A. M. Bradley.*

Solicitor for the defendants: *S. W. Riley.*

W. A.

HENNELL *v.* DAVIES AND ANOTHER.

1893 *Jan.* 27.

Practice—County Court—Payment into Court without Denial of Liability—How far an Admission of the Cause of Action—County Court Rules, 1889, *Order* IX., *r.* 11, *Form* 104 (*a*).

In an action in the county court to recover 27*l.* for work done, the defendants paid 10*l.* into Court without any denial of liability:—

Held, that the payment into Court admitted nothing but a liability to the amount of 10*l.*, and that, except as to that amount, the defendants were not precluded from shewing that the work was not done at their request.

APPEAL from county court of Kent.

The action was brought to recover the sum of 27*l.* 1*s.* for work done by the plaintiff for the defendants as an engineer.

The defendants had employed one Gould, an engineer, to make a certain survey and plans with a view to giving evidence on their behalf in certain pending litigation. Gould employed the plaintiff to make an independent survey with a view to his giving corroborative evidence. The plaintiff accordingly did the work and gave the evidence. He then sent in his bill to the defendants, which was as follows:—

	£	*s.*	*d.*
To making survey	6	6	0
Out-of-pocket expenses	0	16	0
To perusing and settling affidavit . . .	1	1	0
To drawing plans and preparing proof of evidence	9	9	0
Two copies of drawings	4	4	0
To attending Court two days	6	6	0
	28	2	0
Less received on subpœna . .	1	1	0
	£27	1	0

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Upon that bill the action was brought. The action was commenced in the High Court, the particulars of demand above specified being indorsed on the writ; but before defence delivered the action was remitted to the county court.

The defendants paid into Court the sum of 10*l.* without a denial of liability. But at the hearing they sought to dispute Gould's authority to employ the plaintiff to do the work on their behalf. The deputy county court judge held that, having regard to the terms of Order IX., r. 11, and Form 104 (*a*), of the County Court Rules, 1889, the payment into Court admitted the retainer of the plaintiff by the defendants, and that the only point open to the defendants was whether the charges were fair and reasonable. No evidence having been given for the defendants to shew that the charges were excessive, the judge gave judgment for the plaintiff for the full amount claimed. The defendants appealed.

R. D. Muir, for the defendants. Payment into Court is an admission that the amount paid in is due upon some one or more of the items claimed, but it admits nothing more. It is not an admission that something is due upon each item. This was the settled rule under the old practice: see *Steavenson* v. *Corporation of Berwick* (1), and *Kingham* v *Robins* (2), and there is nothing in the County Court Rules or in the Supreme Court Rules (which are in terms similar to those of the County Court Rules) to alter the old practice.

E. W. Garrett, for the plaintiff. The deputy county court judge was right. By Order IX., r. 11, of the County Court Rules, 1889, "Every such payment (into Court) shall be taken to admit the claim or cause of action or complaint in respect of which the payment is made, unless the defendant shall, at the time of paying the money into Court, file with the registrar a notice according to the form in the Appendix, stating his name and address, and further stating that, notwithstanding such payment, the defendant denies his liability." And the form of notice given in the Appendix, Form 104 (*a*), is this: "Take notice that the above-named defendant has paid into Court the sum of ———*l.* in satisfaction of the whole of the plaintiff's claim

(1) 1 Q. B. 154. (2) 5 M. & W. 94.

herein [or of so much of the plaintiff's claim as relates to (*here describe the part of the claim or cause of action in respect of which the payment is made*)]. And, further, take notice that, notwithstanding such payment, the defendant denies his liability." This alters the old practice. Prior to the Judicature Acts payment into Court in an action on an indebitatus count merely admitted *a* cause of action up to the amount paid in; but under the present rules it admits *the* cause of action, that is to say, the whole cause of action to which the particulars relate. According to the form, the defendant is bound to specify the items in respect of which the payment into Court is made, in order that the plaintiff may know which items are disputed and which are not.

LORD COLERIDGE, C.J. I am of opinion that the payment into Court had not the effect which the deputy county court judge thought it had. It admitted nothing more than a liability up to the amount paid in. The interlocutory observations of the judges in *Steavenson* v. *Corporation of Berwick* (1) directly decide the point. The case must go back for a new trial.

CHARLES, J. I am of the same opinion. The deputy county court judge seems to have held that payment into Court without denial of liability admitted that something was due on every item, and in so holding I think he was wrong. It is clear from the case of *Steavenson* v. *Corporation of Berwick* (1), that under the former practice payment into Court recognised nothing more than a liability to a certain extent; and to my mind there is nothing in the rules of the Supreme Court or of the county court to alter that practice.

Order for new trial.

Solicitors for plaintiff: *Sismey & Sismey.*
Solicitors for defendants: *Waller & Sons.*

(1) 1 Q. B. 154.

J. F. C.

1893
Jan. 17.

THE SALT UNION, LIMITED, APPELLANTS; WOOD, RESPONDENT.

Ship—Offences by Seaman—Summary Proceedings—"Sea-going Ship," what is—The Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 109, 243.

By s. 109 of the Merchant Shipping Act, 1854, "the whole of the third part of this Act shall apply to all sea-going ships registered in the United Kingdom"; and s. 243 in the third part of the Act enables seamen to be punished summarily in the specified way for certain offences.

The respondent was engaged on a screw steamer, of about 142 tons gross tonnage, registered as a British ship at the port of Liverpool. She was exclusively used to carry salt upon the rivers Weaver and Mersey from Winsford to Liverpool, where it was transferred to ocean-going vessels. Her voyages, so far as they were upon the river Mersey, were in tidal waters, but did not extend in such tidal waters beyond the limits of the port of Liverpool:—

Held, that the ship was not a "sea-going" ship within the meaning of s. 109 of the Merchant Shipping Act, 1854, and, therefore, that proceedings could not properly be taken against the respondent under s. 243.

CASE stated under the Summary Jurisdiction Acts by three justices of the peace of the county of Chester.

The respondent was summoned under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90) (1), to appear before a court of summary jurisdiction for having unlawfully refused to carry out his contract of service with, and to obey the orders of, the appellants, who claimed 10*l.* damages.

The following facts were proved or admitted before the justices, and stated in the case:—

The respondent was one of the crew of the screw steamship *Albion*, a vessel or barge exclusively used for the conveyance of salt upon the rivers Weaver and Mersey from Winsford, the place of its manufacture, to Liverpool, where it was transferred

(1) Sect. 4 enables a court of summary jurisdiction to hear and determine disputes between employers and workmen, and to award damages, not exceeding 10*l.*, for breaches of contract. By s. 10: "The expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour . . . has entered into or works under a contract with an employer, whether the contract be made before or after the passing of the Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

to ocean-going vessels. The voyages of the *Albion* were upon the rivers Weaver and Mersey only, and so far as upon the river Mersey the same voyages were upon tidal waters, and did not extend on such tidal waters beyond the limits of the port of Liverpool.

The *Albion* was registered under the Merchant Shipping Acts as a British ship in 1887 at the port of Liverpool, her gross tonnage being 142·87 tons, and registered tonnage 102·99 tons, as appeared by the certified copy of the entry of her registration.

The crew of the *Albion* consisted of three men, respectively known as captain, engineer, and hand or mate. The respondent was hand or mate on the *Albion*.

The respondent's duties were to obey the captain's orders in navigating the *Albion*, and also in tarring, scraping, cleaning the cabin, putting the hatches on, working the derrick at Liverpool, assisting at the locks, &c. He was paid weekly wages, and so much per ton, winding, trip money, and tonnage.

No articles of agreement in writing had been entered into between the appellants and respondent, nor was he registered as a seaman. The contract of service was determinable on a week's notice from either party; and a notice given by the respondent to the appellants was put in.

It was alleged that the respondent, on August 19, 1892, refused to comply with the order of the superintendent of the vessels and barges of the appellants to transfer himself to another vessel.

The justices were of opinion that the *Albion* was a "ship," and that the respondent was a "seaman" within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104) (1); and, on the authority of *Great Northern Steamship Fishing Co.* v. *Edgehill* (2), they held that the appellants had no remedy under the

(1) By s. 109: "The whole of the third part of this Act shall apply to all sea-going ships registered in the United Kingdom," with certain specified exceptions. Sect. 243, in the third part of the Act, enables any seaman lawfully engaged to be punished summarily by imprisonment not exceeding twelve weeks, and forfeiture of pay, for (inter alia) wilful disobedience to any lawful command, and continued wilful disobedience to lawful commands, or continued wilful neglect of duty. By s. 518 jurisdiction is given to two justices to deal summarily with any offence made punishable by imprisonment not exceeding six months, or by any penalty not exceeding 100*l*.

(2) 11 Q. B. D. 225.

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Employers and Workmen Act, 1875, and, therefore, dismissed the complaint.

The question of law for the opinion of the Court was:—

Whether the respondent was a workman who could be dealt with under the summons issued under the Employers and Workmen Act, 1875; or,

Whether he was a seaman, and ought to have been summoned and dealt with under the Merchant Shipping Act, 1854.

J. E. Bankes, (*Joseph Walton, Q.C.*, with him), for the appellants. The justices were wrong in coming to the conclusion that the appellants were bound to proceed under s. 243 in Part III. of the Merchant Shipping Act, 1854. Sect. 109 defines the classes of ships and persons to which Part III. applies, and provides that "the whole of the third part of this Act shall apply to all sea-going ships registered in the United Kingdom," with certain specified exceptions. To bring the case within s. 243, therefore, which deals with offences of seamen and their punishment, the seaman must be engaged on a sea-going ship registered in the United Kingdom. On the facts stated in the case, the *Albion* was not a sea-going ship within the meaning of s. 109, because she did not in fact go to sea. The expression "sea-going" is introduced to provide another qualification than registration, because ships which do not go to sea can be registered. Whether or not a ship is sea-going must be a question of fact. The *Great Northern Steamship Fishing Co.* v. *Edgehill* (1) does not apply, because the ship in that case was undoubtedly a sea-going ship. The decision only was that where the case is brought within s. 243 of the Merchant Shipping Act, 1854, the remedy under the Employers and Workmen Act, 1875, is by implication taken away.

[He also referred to *Overseers of Woolwich* v. *Robertson*. (2)]

Carver, for the respondent. First, there are no negative words in s. 109 of the Merchant Shipping Act, 1854, to exclude ships which do not go to sea from the operation of s. 243. The construction put by Dr. Lushington on s. 109, in *The Milford* (3) and

(1) 11 Q. B. D. 225. (2) 6 Q. B. D. 654.

(3) Sw. 362.

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The Jonathan Goodhue (1), should, therefore, be applied here. He was dealing with s. 191 in the third part of the Act, which gives the master of a ship the same rights and remedies for the recovery of his wages as seamen have under the Act, and he held that, as there were no negative words in s. 109 shewing that s. 191 did not apply to foreign masters and seamen, the Court was not bound to impose a restriction, not found in the Act, upon those masters and seamen. Secondly, the *Albion* was a sea-going ship within the meaning of s. 109. The facts stated in the case shew that she was capable of going to sea; she was registered, and the object of registration is to enable the ship to get her clearances in order to go to sea. It is submitted that a "sea-going" ship in s. 109 means a ship so constructed and found as to be capable of going to sea. Further, the part of the river Mersey which the *Albion* navigated is the sea. It is tidal water, with only a small proportion of fresh water. The appellants, therefore, ought to have taken their proceedings under s. 243 of the Merchant Shipping Act, 1854, and are excluded from proceeding under the Employers and Workmen Act, 1875.

LORD COLERIDGE, C.J. This case has been stated very fairly and lucidly by the magistrates, and it has been extremely well argued on both sides. We have every material before us for the determination of the point raised, and it comes to the very simple question whether the case is brought within s. 243 of the Merchant Shipping Act, 1854. If it is, the proceedings before the magistrates were not rightly taken; if it is not, then the proceedings were rightly taken. The question depends upon the construction of a single word in s. 109 of the Merchant Shipping Act, 1854, which provides that the whole of the third part of that Act "shall apply to all sea-going ships registered in the United Kingdom." The ship in question is a British ship registered in the United Kingdom. Is she a sea-going ship? Both of those conditions must concur in order to bring the ship within s. 243 in the third part of the statute. I am of opinion that the case is not within the Act of Parliament. It is a statute which has

(1) Sw. 524.

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to be acted upon every day, and we must give a simple, clear, and (if possible) a sensible interpretation to this provision, and a meaning capable of being at once applied by the tribunals which have to act under the provision. I cannot conceive anything more likely to lead to confusion and difficulty than if we were to give a construction to the word "sea-going," which would involve the magistrates entertaining a variety of considerations —such as whether the ship might go to sea, or might be sent to sea, or was capable of going to sea—and would involve their deciding whether those conditions precedent to the exercise of their jurisdiction were made out. It is a simple proposition to hold that a sea-going ship means a ship which does go to sea. It is not disputed that this ship does not go to sea. She is one of a line of ships which conduct traffic along a river to a point in the Mersey, where they are met by, and transfer their cargo to, ocean-going ships. She cannot, to my mind, be said to be a sea-going ship. No doubt she *could* go to sea; but she does not go. The first question asked by the magistrates must, therefore, be answered in the affirmative; the second question in the negative. The case must go back to the justices for a re-hearing upon these answers.

CAVE, J. I am of the same opinion. The question raised is a very narrow one, and depends upon a clause in s. 109 of the Merchant Shipping Act, 1854; and the construction of that clause depends upon the application of the principle "Expressio unius est exclusio alterius." That depends upon what is the "unus" and what the "alter." The "unus" obviously is a sea-going ship registered in the United Kingdom. In the Admiralty cases cited, Dr. Lushington had to say whether the "alter" was all other ships, whether British or foreign, or simply ships which did not go to sea. It seems to me that the judgment of the learned judge must be taken to mean, not that there was no "exclusio" at all, but that the "alter" was not all foreign ships, but only such foreign ships as did not go to sea, and that consequently the section applied partly to foreign ships. If that was the ground upon which he came to his conclusion, the reasoning would rather favour the appellants' contention here

than the respondent's. On the other point I entirely agree with the judgment of my Lord. I entertain no doubt that this was not a sea-going ship.

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Judgment for the appellants.

Solicitors for the appellants: *Bush & Co., for J. H. Cooke, Winsford.*

Solicitor for the respondent: *J. W. Thompson, Liverpool.*

W. A.

[IN THE COURT OF APPEAL.]

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IN RE AN ARBITRATION BETWEEN THE KIRKLEATHAM LOCAL BOARD AND THE STOCKTON AND MIDDLESBOROUGH WATER BOARD.

Waterworks—Purchase of Mains and Pipes and Fittings—Principle of Valuation—Practice—Appeal—Arbitration Act, 1889, *s.* 19.

The Stockton and Middlesborough Corporation Waterworks Act, 1876 (39 & 40 Vict. c. ccxxx.), provides for the transfer of the undertaking of a waterworks company to the "Stockton and Middlesborough Water Board," and empowers the Board to construct further works to improve the supply of water in Stockton and Middlesborough and in outlying districts. By s. 4, the limits of the Act for the supply of water are to include the company's present limits and certain specified places beyond such limits, and it is provided that the Board "shall, when so required by the sanitary authority of any district beyond the boundaries of the boroughs of Stockton and Middlesborough respectively, sell to such sanitary authority all mains, pipes, and fittings belonging to the board within that district" . . . at a price to be fixed, in default of agreement, by arbitration, and after such sale the Board shall cease to supply water within such district.

In an arbitration under the foregoing section, the arbitrator made his award in the form of a special case for the opinion of the Court, in which he stated that in fixing the price of mains, pipes, and fittings (sold by the Board to the sanitary authority of an outlying district) at a specified sum, he took into consideration the loss of revenue earned by the Board by the supply of water through such mains, pipes, and fittings; but if the Court should be of opinion that this basis of calculation was wrong, he fixed this price at a lower figure:—

Held, first, that an appeal lay from the judgment of a Divisional Court upon such special case to the Court of Appeal.

In re Knight and Tabernacle Permanent Building Society ([1892] 2 Q. B. 613) distinguished.

Secondly, that the basis of calculation adopted by the arbitrator was wrong, and that the price to be ascertained was the reasonable price of such mains, pipes, and fittings regarded as apparatus fitted in the ground and capable of earning a profit, but without any compensation to the Board for the loss of the right of supplying water within the district.

APPEAL by the Stockton and Middlesborough Water Board from a decision of the Queen's Bench Division (Pollock, B., and

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Vaughan Williams, J.) upon a special case stated by an arbitrator.

By the Stockton and Middlesborough Corporation Waterworks Act, 1876 (39 & 40 Vict. c. ccxxx.), after recitals to the effect that the Stockton, Middlesborough, and Yarm Waterworks Company were then supplying with water the boroughs of Stockton-on-Tees and Middlesborough and their respective neighbourhoods, and that the populations of those towns had greatly increased, and that the present appliances of the company were insufficient for adequately supplying them, and that it would be of great advantage to the boroughs and their neighbourhoods if the undertaking of the company were vested in the corporations of those boroughs, and that it was expedient that the corporations should be empowered to construct further works to improve the supply of water to the boroughs, it was enacted (s. 4): "The limits of this Act for the supply of water shall comprise and include the company's present limits, and the parishes, townships, and places, or parts of parishes, townships, and places, set forth in the 1st schedule to this Act annexed: Provided always that the joint board hereinafter constituted shall, when so required by the sanitary authority of any district beyond the boundaries of the boroughs of Stockton and Middlesborough respectively, sell to such sanitary authority all mains, pipes, and fittings belonging to the joint board within that district other than and except any mains, pipes, or fittings used for service beyond the limits of that district, at a price to be fixed, in default of agreement, by an arbitrator to be appointed for that purpose by the Local Government Board on the application of either party, and after such sale the joint board shall cease to supply water within such district."

Sect. 5 provided that the Act should be executed by a joint board of twelve members, six to be chosen by each corporation from among its own members. The joint board was made a corporation having perpetual succession and a common seal, and power to take and hold lands and other property for the purposes of the Act.

Sect. 15: "The corporations shall, within six months after the passing of this Act, by notice . . . . require the company to sell,

and the company shall thereupon sell, to the corporations all their undertaking, property, rights, powers, and privileges as the same exist at the time of the delivery of such notice, for such consideration, either in perpetual annuities amounting to 18,647*l.*, the present maximum statutory dividend of the company, or, at the option of the company, for a sum in gross, calculated at twenty-five years' purchase of such sum; and in addition to the sum in gross or in perpetual annuities to be paid to the company, the corporation shall take over and pay the statutory debt of the company, at the time of the transfer and vesting of the undertaking in the joint board, and all other the debts and liabilities bonâ fide incurred by or on behalf of the company for the time being, and also shall pay to the company a sum for compulsory sale and for the prospective value of the company's undertaking; and if any difference shall arise in carrying into effect the provisions of this section, the same shall be settled by arbitration, in accordance with the provisions of the Lands Clauses Consolidation Acts, 1845, 1860, and 1869."

The first schedule contained the names of a number of places in Yorkshire, among which was Kirkleatham, and also the names of various places in Durham.

The transfer of the undertaking of the waterworks company to the joint board took effect, and the joint board laid down mains and pipes for supplying Kirkleatham, and supplied it with water for some years. In 1891, the Kirkleatham Local Board, being the sanitary authority of that place, required the joint board to sell them the mains, pipes, and fittings within the district of Kirkleatham. The question of price was referred to an arbitrator appointed by the Local Government Board, and he, on January 18, 1892, made an award fixing the price at 25,424*l.* By an order of the Queen's Bench Division, made on February 22, 1892, the award was referred back to the arbitrator, with directions to restate it in the form of a special case, so as to raise the point of law as to the principle on which the price should be ascertained.

On May 7, 1892, the arbitrator restated his award in the form of a special case. The material part was as follows:—

"At the hearing of the said reference before me, two rival

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contentions were put before me as to the principle upon which the price of the mains, pipes, and fittings under the said Act ought to be ascertained. It was contended, on behalf of the Kirkleatham Local Board, that the basis of calculation should be merely the value of the said mains, pipes, and fittings regarded as plant in situ capable of earning a profit, and this value they arrived at by taking the cost of the mains, pipes, and fittings, of laying them down and making good the ground, and deducting a sum for depreciation. They further contended that I had no jurisdiction to take into my consideration at all the present or prospective earnings of the said mains, pipes, or fittings. On the other hand, it was contended, on behalf of the joint board, that the price must be ascertained by reference to the value of that which was parted with, but that that value must be taken as the value to the seller and not the value to the buyer, and that as the sale of the mains, pipes, and fittings in question was coupled with an obligation on the part of the joint board to cease to supply water within the Kirkleatham district, what the joint board were really parting with was their power of earning revenue by the supply of water through the mains, pipes, and fittings in question in the Kirkleatham district; and that, at all events, the value to them of the mains, pipes, and fittings in question was to be measured, not by the cost of providing them and laying them down, or by their mere value as plant in situ, but by the revenue which the joint board was enabled to earn by their means. Having regard to the whole scheme of the said Act of 1876, it seemed to me that the contention of the joint board was the correct one, and I therefore adopted the following basis in arriving at my award. I capitalized the average net revenue earned by the joint board in the Kirkleatham district for the seven years ending August 13, 1891, made all proper deductions for working expenses, maintenance, rates, &c., and, further, deducted the Kirkleatham district's proportion of the revenue-earning part of the Stockton and Middlesborough water undertaking in 1891, less certain deductions, and the result was the figure which I previously awarded, viz., 25,424*l*. In arriving at the said sum of 25,424*l*. I did not take into my consideration, nor does such sum include, any amount in respect of any

prospective increase in the revenue earned by the joint board in the Kirkleatham district. If the Court should be of opinion that I was wrong in adopting the basis of calculation aforesaid, and that the basis contended for by the Kirkleatham Local Board should have been adopted, then I award in the alternative that the price of the mains, pipes, and fittings, calculated upon such basis, is the price or sum of 8006*l.*"

The Divisional Court gave judgment, declaring that the arbitrator was wrong in adopting the basis of calculation adopted by him in making the award of January 18, 1892, and that the basis of calculation contended for by the Kirkleatham Local Board, as stated in the restated award, should have been adopted, and that the award ought accordingly to stand for 8006*l.*

The Stockton and Middlesborough Water Board appealed.

Dec. 7, 9. *Sir R. Webster, Q.C., Balfour Browne, Q.C., Claude Baggallay,* and *Scott Fox,* for the appellants.

Finlay, Q.C., for the respondents. There is a preliminary objection that no appeal can be brought to this Court. The order on the arbitrator to state a special case must have been made under the Arbitration Act, 1889, s. 19. In *In re Knight and Tabernacle Permanent Building Society* (1) it was decided by the Court of Appeal that no appeal lay from the opinion expressed by the Court on a case stated under that section. The appellants will rely on the distinction taken by Bowen, L.J., in the same case. The point arose in *Jones* v. *Victoria Graving Dock Co.* (2), and the Court was disposed to hold that no appeal would lie; but the case went off on the ground of an agreement that there should be no appeal. The contention of the appellants is, that admitting that where the arbitrator before making his award applies to the Court for information as to the principle on which he ought to proceed, no appeal will lie from the opinion given by the Court, yet if he makes his award allotting one sum if the Court adopts one principle, and another sum if the Court adopts a different principle, an appeal will lie.

[BOWEN, L.J. Under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 5, an arbitrator may state his award in

(1) [1892] 2 Q. B. 613. (2) 2 Q. B. D. 314.

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the form of a special case for the opinion of the Court. Is not that what has been done here?]

Sir R. Webster, Q.C., for the appellants, was not called upon.

LINDLEY, L.J. A right of appeal clearly exists unless it is taken away by s. 19 of the Act of 1889, and I am of opinion that it is not taken away. The case is not within the decision in *In re Knight and Tabernacle Permanent Building Society* (1), nor within the mischief there referred to.

BOWEN, L.J. I am of the same opinion. I will read what I said in *In re Knight and Tabernacle Permanent Building Society* (1), because I am certain that it expresses the opinion of the whole Court: "The Arbitration Act, 1889, in order to assist arbitrators, has given power to an arbitrator to take the opinion of the Court in two ways. He may state his award in the form of a special case. When that is done the arbitrator has exhausted his powers; he has made his award in such a shape that the opinion of the Court will determine the rights of the parties, and turn the award into one groove or the other. Therefore, the opinion of the Court is in that case an effective determination of the rights of the parties. I do not doubt that in such a case there might be an appeal from the decision of the Divisional Court upon a special case." The truth is, that under the Common Law Procedure Act, 1854, s. 5, a special case might be stated in the award, and it was held in a number of cases that an appeal lay from the decisions of the Court upon it. In *In re Knight and Tabernacle Permanent Building Society* (1) it was unsuccessfully attempted to bring the two classes of cases together, and to apply the rule that there was an appeal, to a case where the arbitrator had *not* stated his award in the form of a special case, but had asked the opinion of the Court by way of interlocutory proceeding in order to assist him to form his judgment.

A. L. SMITH, L.J. I am of the same opinion.

Objection overruled.

(1) [1892] 2 Q. B. 613.

Sir R. Webster, Q.C., Balfour Browne, Q.C., Claude Baggallay, and *Scott Fox,* for the appellants. The mains, pipes, and fittings were to be sold at a price to be fixed by the arbitrator. The sanitary authority not only purchase from the board the mains, pipes, and fittings, but deprive the board of the power of supplying water through them. There is nothing in the Act to define the principle on which the arbitrator is to value; the price is left to his discretion, and he considers that the price ought to be the value of the apparatus to the sellers. Now, in estimating the value to the sellers, the amount the board was earning by them ought to be taken into account. Their just value is their value as an apparatus earning profits. Cost price is not necessarily a test of present value. There might be a number of superfluous pipes which were of no value. Suppose a house to be sold compulsorily: the test of its value is not what it cost in building, but the rent which it will command; so here the question is, what will a person give to possess mains and pipes fitted in the ground and capable of earning a revenue? It was never intended by parliament that each district should be entitled to buy up the mains and pipes within it as old iron, leaving the board with reservoirs and pumping-stations erected at great expense and rendered useless. But suppose the principle contended for by the appellants is wrong, the 8006*l.* is not assessed on a correct principle, for the arbitrator has based his valuation on the cost of materials and laying down, less depreciation, which is no test of the value of the mains and pipes at the present time.

Finlay, Q.C., and *J. G. Wood,* for the respondents. The argument of the appellants mixes together two things which are wholly distinct and must not be confounded—the value of the plant and the value of the right of supplying water. Sect. 4 defines what is to be sold, and the board ask the Court to read into it a provision that they shall receive compensation for the loss of the right of supplying water. This was never intended by the legislature. In rating cases, where pipes run through a parish, the test of their value is what would be the rent at which they would let if they belonged to some person other than the occupier. The arbitrator here estimates the value by reference to what would be gained by the person using the mains and pipes;

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this is giving compensation for the goodwill of the water supply, not giving the value of the pipes. There was no goodwill, for the board had only a defeasible right. The contrast of language between ss. 4 and 15 is strongly in favour of the respondents. If parliament had intended that there should be compensation for goodwill there would have been language in s. 4 similar to that in s. 15, not a mere direction for the sale of the mains and pipes.

Scott Fox, in reply.

LINDLEY, L.J. The question raised by this appeal is whether the arbitrator, in making his award, has exceeded his power in awarding the sum of 25,424*l.* to the Stockton and Middlesborough Joint Board, in respect of certain mains, pipes, and fittings which have been purchased by the Kirkleatham Local Board.

In order to understand the position of affairs, and the points of law which have been discussed, it is necessary to refer shortly to the Act of 1876 (39 & 40 Vict. c. ccxxx.), and to consider its scope.

It appears from the recitals of that Act that, before 1876, there was a waterworks company called the Stockton, Middlesborough, and Yarm Waterworks Company, which supplied Stockton, Middlesborough, and their respective neighbourhoods with water, and that the population of those districts had very much increased, and that it would be for the benefit of the public if the undertaking of the waterworks company were acquired by the two corporations of the towns of Stockton and Middlesborough, and accordingly, by s. 15 of that Act, provision is made for the purchase by these corporations of all the undertaking, property, and powers of the waterworks company, subject to the payment of compensation. It was further part of the scheme of this Act that the undertaking of the waterworks company should, after payment by the corporations, be vested in a joint board constituted by s. 5, and consisting of twelve members, six appointed by each corporation. They were to have the undertaking vested in them, and were to work it under the provisions of the Act. Part of the scheme of the Act was to extend the limits for the supply of water by the corporations, or by the joint board, which

for this purpose may be considered as representing them, and it is important to bear in mind that the joint board, who in this case are the sellers, had no existence whatever for any purpose whatever except for the purposes defined by the Act. In considering their rights as between themselves and the Kirkleatham Local Board, it is important to bear in mind that the vendors were not ordinary owners of a going concern, but were only invested with statutory powers to be exercised on certain conditions.

The extended limits within which the water may be supplied by the joint board after the undertaking of the waterworks company shall have been acquired, are stated in s. 4 of the Act, and they include Kirkleatham, which has a local board. Then there is a proviso which is all-important, because it states the terms and conditions upon which the powers of the joint board are to cease, and sales by the joint board of mains, &c., acquired by them under the provisions of the Act are to be made: "Provided always that the joint board hereinafter constituted shall, when so required by the sanitary authority of any district beyond the boundaries of the boroughs of Stockton and Middlesborough respectively, sell to such sanitary authority all mains, pipes, and fittings belonging to the joint board within that district" (that is, the buying district) "other than and except any mains, pipes, or fittings used for service beyond the limits of that district, at a price to be fixed, in default of agreement, by an arbitrator to be appointed for that purpose by the Local Government Board on the application of either party, and after such sale the joint board shall cease to supply water within such district."

The meaning of that proviso appears to me to be reasonably plain. The joint board having been called into existence under this Act, and created by the Act for the purposes of the Act, are to have the extended powers conferred by the Act upon this condition, that, if the local authority in any of the enumerated townships shall require, the joint board shall sell to them the mains, pipes, and fittings within that district, and not required in any other district, and thereupon the joint board shall cease to supply that district. Now, what strikes one forcibly on reading this section is that there is not a word in it about compensation, and compensation is not the principle upon which it is based.

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The joint board are by the statute to cease to supply that district on the requisite notice, and on payment for the mains, pipes, and fittings. It is true that as soon as the joint board ceases under the statute to have power to supply water to the purchasing district, the purchasing district acquires the right to supply water under the Public Health Act, 1875, s. 5; but what the joint board are to sell, and what they are to be paid for, is simply the mains, pipes, and fittings. It is no part of the scheme of this legislation that they should be compensated for or paid for the right which they lose of supplying the purchasing district with water.

Bearing this in mind, we approach the award of the arbitrator, which under an order of the Court he has stated in the form of a special case. He says that before him the buyers and the sellers differed in their views as to the principle upon which the price of these mains, pipes, and fittings was to be ascertained. The buyers contended that the basis of calculation should be merely the value of the mains, pipes, and fittings, regarded as plant in situ capable of earning a profit. The sellers contended that they were entitled to be paid for them a price which is in substance and effect compensation for the loss of the right to supply the Kirkleatham district. The arbitrator in the first place had adopted the view of the sellers and awarded 25,424*l.* on that footing, and nobody quarrels with the amount if the principle contended for by the sellers is right. He has now stated in the alternative that, if the basis contended for by the buyers is right, 8006*l.* is the proper amount. Now, which is the right principle? I quite agree with the proposition that we ought not to disturb the finding of the arbitrator for the larger sum of 25,424*l.* unless we see that he proceeded on a wrong principle; but it appears to me, for the reasons I have given, that the award of that larger figure is wrong, because the arbitrator, in estimating the price of the pipes, mains, and fittings, has really included compensation for the loss of the right to supply water to the district, and that to my mind is contrary to the Act.

I am not surprised that the arbitrator went wrong, for if you look at the joint board as ordinary vendors, as vendors of a water-

supplying business, it would be hard to deprive them of compensation; but the arbitrator has gone wrong in not realizing who the vendors were, and in not seeing that they were a mere statutory authority acquiring this property and this right upon terms fixed by the Act of Parliament, which terms were not intended to give them any right to compensation for the loss of the profit which they made in supplying the district.

In my judgment, therefore, the appeal must be dismissed, with costs.

Bowen, L.J. I am of the same opinion. It seems to me, as it does to the Lord Justice, that the key to the section is that it does not provide compensation to the sellers, but merely enables them to obtain the price of something which is to be sold; and that something which is to be sold is defined in clear language as the mains, pipes, and fittings belonging to the sellers within the district. The section is so framed as to exclude from the calculation of the price any reference to the sellers being deprived of their right to supply water within the district, and, although there might at first sight appear to be injustice in an Act which deprives the joint board of their right to supply the district without giving them any compensation, the circumstances of the case shew, as the Lord Justice has explained, that it is only an apparent injustice. The legislature unquestionably has said that what the sellers are to receive is price as distinct from compensation.

Now, it seems to me that the price can only be ascertained on one basis, and that basis, subject to one or two remarks which I will make in a moment, is the basis contended for by the Kirkleatham Local Board. I think that the proper price must be ascertained by considering what would be a reasonable sum for a willing purchaser to pay for those pipes as pipes capable of earning a revenue by supplying the district which they cover. That basis of calculation is certainly not the basis of calculation adopted by the arbitrator in arriving at the 25,424*l*. He states the contention of the joint board, and, although he excludes the prospective chances of earning revenue, he has adopted the view that the value was to be taken as the value to the sellers and

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not to the buyers, and that as the sale of the mains, pipes, and fittings is to be coupled with the obligation to cease to supply water to the district, "what the joint board were really parting with was their power of earning revenue by the supply of water through the mains, pipes, and fittings in question, in the Kirkleatham district; and that, at all events, the value to them must be measured, not by the cost to the joint board of laying them down, but by the revenue the joint board are able to earn by their means." That is really stating the principle of compensation, and is totally distinct from giving a reasonable sum to be paid by the purchasers for them as pipes capable of supplying the district. The 25,424*l.*, therefore, must be wrong.

Then comes the question, is the other figure right? It seems to me that only two alternatives were placed before the arbitrator —viz., 25,424*l.* and 8006*l.* Unless we can see that the 8006*l.* is arrived at on a clearly wrong principle, it is not our duty to send the matter back to the arbitrator in order that he should reconsider the whole case. But so far from thinking that he has not taken the right basis, it seems to me, on reading his language fairly and justly, and taking the figures he has supplied to us, that he has taken the right basis. He says: "It was contended on behalf of the Kirkleatham Local Board that the basis of calculation should be merely the value of the said mains, pipes, and fittings regarded as plant in situ capable of earning a profit." That clearly is the correct way of looking at it, and if the matter stood there nothing could be inferred against the 8006*l.* from the mere fact that it is arrived at on the basis contended for by the Kirkleatham Local Board. He says: "If the Court should be of opinion that I was wrong in adopting the basis of calculation aforesaid" (that on which he found the 25,424*l.*), "and that the basis contended for by the Kirkleatham Local Board should have been adopted, then I award in the alternative that the price of the mains, pipes, and fittings, calculated upon such basis, is the price or sum of 8006*l.*"—that is to say, he has taken 8006*l.* as the proper figure of value to be allowed for the "mains, pipes, and fittings regarded as plant in situ capable of earning a profit." The only difficulty is caused by his telling us that the Kirkleatham Local Board arrived at the value of the mains, pipes, and fittings as plant in situ capable

of earning a profit "by taking the cost of the mains, pipes, and fittings, of laying them down and making good the ground, and deducting a sum for depreciation." Now, if that was put forward as the principle for ascertaining between seller and buyer the price of a thing in situ capable of earning a profit, I should say it was not the right principle; but it is not put forward by the arbitrator as the basis, and was very probably the only way in which the Kirkleatham Board could frame their case so as to give approximately the result of the principle they desired to put forward.

I think, therefore, that the arbitrator has taken the right basis, and he seems to me to have gone as near as he could on the evidence to a just result. I am convinced that it is right, for it seems to me that both parties before the arbitrator were satisfied to treat the 25,424*l.* as the true figure if the contention of the joint board as to the basis of calculation was correct, and to treat the 8006*l.* as the maximum figure which ought to be paid if the mains, pipes, and fittings were to be valued "as plant in situ capable of earning a profit."

A. L. SMITH, L.J. I agree that the judgment of the Divisional Court should be upheld.

In order to arrive at the true construction of s. 4 of the Act of 1876, it is important to state shortly the circumstances leading up to the passing of that Act. An old waterworks company at Stockton and Middlesborough had been formed under an Act of Parliament prior to 1876, for the purpose of supplying water, and in that year the corporations of Stockton and Middlesborough went to parliament for increased powers, which vastly enlarged the area over which they were to be allowed to supply water; and it seems to me that the legislature when giving to the Stockton and Middlesborough Corporations the powers they asked, did so subject to one condition, viz., that they might only go on supplying the districts named in the Act with water until any of the sanitary authorities in any of those districts came in and said they wanted to supply the water themselves, and then the corporations were to cease doing so.

Now, I want to emphasize this, viz., that the joint board

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formed under this Act had no absolute monopoly of supplying water. They had only a monopoly subject to a defeasance, that is of supplying water to Kirkleatham until Kirkleatham came in and said, "I want to do it myself."

Then, that being so, the question arose before parliament what was the sanitary authority to pay for when it came in and said, "I want to supply water myself"? Now, of course, the Kirkleatham Board must pay for what the joint board have to sell; but had these corporations the right of supplying water in Kirkleatham to sell? I say they had not, for the simple reason that the Act only gave them a right to supply Kirkleatham until Kirkleatham said, "I am going to do it myself." That might be a year, a month, or a day after the mains were laid down by the corporations. But the whole argument of Sir Richard Webster was, that what the Kirkleatham people were buying was not only the mains and pipes and so on, but the right of supplying water. It seems to me that this Act did not give the joint board any right to supply water, but only a right to supply it until Kirkleatham said, "I am going to supply it myself." Now by the statute what is it that the joint board is to sell to the Kirkleatham Board? The statute is plain, "all mains, pipes, and fittings belonging to the joint board within the district"—that is what they have to sell. There is not a word here importing that they are to sell a right, which to my mind did not exist.

The mains, pipes, and fittings being, then, the only things to be sold, how are they to be paid for? They are to be paid for at a price to be fixed by an arbitrator.

A question put by Mr. Finlay in his argument was very apposite. He said, Supposing the joint board put down mains, pipes, and fittings in Kirkleatham at a total cost of 10,000*l.* on April 1, and on May 1 the Kirkleatham people, as they were entitled to do under the statute, said, "We want to supply ourselves with water," so that s. 4 was brought into play—supposing there were no deterioration in the pipes, and no advancement in value in the pipes, in those circumstances what would Kirkleatham have to pay? I answer unhesitatingly, 10,000*l.*, and no more. That is what has to be sold and what

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has to be bought, and it is a fallacy to try to take in, as was done by the arbitrator in this case at the instance of the joint board, a right which they never had to sell, viz., that of supplying water. In my judgment, therefore, the 25,424*l.* is wrong.

Now I come to the other figure. It seems to me that in assessing the 8006*l.* the arbitrator laid down the right principle, and I see no reason for disturbing his finding.

Appeal dismissed.

Solicitors: *J. J. Lincoln, for John T. Belk, Middlesborough; H. O. Soutter.*

H. C. J.

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PEARSON, APPELLANT *v.* THE ASSESSMENT COMMITTEE OF THE HOLBORN UNION, RESPONDENTS.

Poor-rate—Exemptions—Crown Property—Servants of the Crown—Occupation for Crown Purposes—Volunteer Corps—Storehouse for Arms—Volunteer Act, 1863 (26 & 27 *Vict.* c. 65), s. 26.

Premises occupied by a volunteer corps for the purpose of the service of the corps, and being reasonably necessary for such service, are occupied by servants of the Crown for the purposes of the Crown, and, therefore, are exempt from rates.

Therefore, premises occupied by the commanding officer of a volunteer corps for the purpose of the service of the corps, and being reasonably necessary for such service, are exempt from rates, including both such part of the premises as is a storehouse for the depositing and safe keeping of arms, ammunition, and stores, within the meaning of s. 26 of the Volunteer Act, 1863, and, therefore, exempted from rates by that section, and all such other parts of the premises as are reasonably necessary for the service of the corps.

CASE stated under 32 & 33 Vict. c. 67, s. 40.

The questions raised by the case concerned the rateability of certain premises in Leonard Street, E.C., used as a storehouse, drill-hall, &c., by the 2nd Middlesex Artillery Volunteers.

The appellant contended that the whole premises were exempt from rateability (*a*) as storehouses within s. 26 of 26 & 27 Vict. c. 65, (*b*) as being in the occupation of the Crown for the purposes of the Crown.

The appellant was assessed in the valuation list for the parish of St. Luke, in the Holborn Union, in respect of so much of

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the premises as the respondents alleged were not occupied as a storehouse within the meaning of s. 26, at a gross value of 336*l.*, and a rateable value of 280*l.* Notice of appeal against such assessment was duly given.

The appellant was the commanding officer of the 2nd Middlesex Artillery Volunteers, and as such was lessee of the premises the subject-matter of the assessment under a lease for twenty years, at a rental of 400*l.* per annum. The 2nd Middlesex Artillery Volunteer Corps consisted of 634 officers and men. It was one of the volunteer corps of the Eastern Division of the Royal Artillery, and for discipline and command was included in the Home District, being subject to the orders of the major-general commanding such district. The premises in question had four floors, with a gun-shed and drill-hall at the back extending to the roof. The primary purpose of the said premises was that of a storehouse for the guns, arms, and ammunition of the corps. These comprised eight guns—namely, five 64-pounders, one 40-pounder, and two 12-pounders; also 530 stands of arms, with corresponding ammunition, all the property of the Crown. There were also kept on the premises the uniforms of about 350 men. The said premises had been duly certified as a storehouse by the authorities pursuant to 26 & 27 Vict. c. 65, s. 26. The said premises also served the purpose of a place of meeting for drill, military instruction, &c. Three non-commissioned officers and their families resided permanently upon the premises; the guns, stores, ammunition, &c., were in charge of such officers. The military authorities insisted, as a condition to the supply of the guns and the granting of the certificate, upon the presence of three such non-commissioned officers. It was found in the case that the presence of these officers was reasonably necessary for the purpose of such safe keeping, care and charge.

It was admitted by the respondents that, for the purpose of a storehouse within the meaning of s. 26, portions of the premises were necessary and proper. It was found as a fact, that for the purposes of such storehouse the whole of the premises were necessary and proper, except, on the first floor, the officers' mess-room, the officers' ante-room, the canteen, the sergeants' room, the men's mess-room, and on the third floor, two rooms.

The excepted parts, though suitable and proper for the purposes of the corps, were not storehouses within the meaning of s. 26.

The value of the whole premises was 410*l.* gross value, and 341*l.* 13*s.* 4*d.* rateable value. It was found that the value of the portions of the premises which were not storehouses within the meaning of s. 26 was 80*l.* 8*s.* 1*d.* gross value, and 66*l.* 10*s.* 1*d.* rateable value.

The whole of the premises were used solely for the purposes of the corps. The appellant, Lieutenant-Colonel Pearson, had no use or occupation of the premises other than as colonel commanding the corps, and in discharge of his duties as such. With the exception of the three non-commissioned officers above mentioned, the officers and men of the corps had no use or occupation of the premises other than in their capacity of artillery volunteers.

Of the three non-commissioned officers who resided permanently upon the premises, two were upon the establishment of the regular army, and received their pay through one of Her Majesty's paymasters, and the third was a "volunteer," having retired from the army upon a pension.

The rent of the premises was paid from the general fund of the corps, formed in part from the Government grant (about 171*l.* per annum), in part by voluntary subscriptions (about 200*l.* per annum).

The questions for the opinion of the Court were: (1.) whether the whole of the premises were exempt from rates; (2.) whether the portions of the premises necessary and proper for storehouses were alone exempt from rates.

By the Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 26: "The commanding officer of a volunteer corps or administrative regiment receiving any arms, ammunition, or other stores, supplied at the public expense or by subscription, shall, subject to the approval of the lieutenant of the county to which the corps belongs, or in which the head-quarters of the administrative regiment are situate (as the case may be), appoint a proper storehouse for the depositing and safe keeping of such arms, ammunition, or stores. Every such storehouse shall be free from all county, parochial, or other local rates and assessments."

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Poland, Q.C. (*E. Boyle,* with him), for the appellant. The whole of the premises are exempt from rates. First, the exemption contained in the Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 26, applies to the whole premises. It is admitted that the exemption applies to a considerable portion of the building, which is certified as a storehouse under s. 26, and those portions of the building which do not come within the literal meaning of the word "storehouse" are still within the exemption, as being necessary for the proper use of the certified storehouse. Secondly, even if there is any part of the premises that is not within the exemption contained in s. 26, the whole is exempt as being occupied by servants of the Crown and for the purposes of the Crown. The principle of that exemption is explained by Blackburn, J., delivering the opinion of the majority of the judges in the House of Lords, in the cases of *Mersey Docks* v. *Cameron* and *Jones* v. *Mersey Docks* (1), as follows: "The Crown not being named in the statute of Elizabeth, is not bound by it; and, consequently, the overseers cannot impose a rate on the Sovereign in respect of lands occupied by Her Majesty, nor on those occupied by her servants for Her Majesty.

"The exemption depends entirely on the occupier, and not on the title to the property. The tenants of Crown property, paying rent for it, are rateable like all other occupiers. . . . . On the other hand, where a lease of private property is taken in the name of a subject, but the occupation is by the Sovereign or her servants on her behalf, the occupation being that of Her Majesty, no rate can be imposed." (2)

That opinion was adopted by the House of Lords, and must be taken as laying down the law correctly. This principle is further illustrated by the decisions in *Reg.* v. *Stewart*, *Reg.* v. *Stainsby*, *Reg.* v. *Breton*, *Reg.* v. *Foster* (3); *Reg.* v. *Fuller* (4); *Coomber* v. *Justices of Berks* (5), and the various authorities there cited. Several of these decisions are strong authorities in support of the appellant's contention as to this

(1) 11 H.L.C.443; 35 L.J.(M.C.) 1.
(2) 11 H. L. C. at pp. 463, 464.
(3) 8 E. & B. 360.
(4) 8 E. & B. 365 (note).
(5) 9 Q. B. D. 17; 10 Q. B. D. 267; 9 App. Cas. 61.

oint; for they make it clear that, in the case of the regular rmy and the militia, premises occupied as these are would be xempt, and, on the true construction of the Volunteer Act, 863, volunteers are equally the servants of the Crown. *Reg.* v. *Vay* (1) shews that buildings used for the custody of the arms nd stores of the militia come within the words "employed for Her Majesty's use or service." If the volunteers are in the same osition as the militia, that would conclude the present case. No loubt, if there were an occupation of more than was reasonably ecessary for the performance of the service the occupier would e rateable, but only in respect of the excess, which would e disregarded if trifling: *Reg.* v. *Stewart.* (2) Here, however, he findings in the case shew that all the occupation was reason-bly necessary, and there was no excess.

Bosanquet, Q.C. (*R. Cunningham Glen,* with him), for the espondents. The exemption in s. 26 of the Volunteer Act, 863, can only apply to the certified storehouse. The findings in he case shew that the other parts of the premises are occupied for ntirely different purposes. The volunteers are not servants of he Crown within the meaning of the decisions which establish he exemption of the regular army and the militia, for they are ot subject to the Mutiny Act until called out for active service 26 & 27 Vict. c. 65, s. 23). Even if the volunteers are servants f the Crown, the findings in the case shew an occupation more han reasonably necessary for the performance of the service, as, or instance, in the case of the mess-rooms and canteen, and the rinciple of rateability in respect of such excess is established y the decisions already referred to, and by numerous other uthorities: *Rex* v. *Hurdis* (3); *Rex* v. *Terrott* (4); *Rex* v. *Brad-ord* (5); *Reg.* v. *Ponsonby* (6); *Gambier* v. *Overseers of Lydford* (7); *Martin* v. *Assessment Committee of West Derby* (8); *Tunnicliffe* v. *Overseers of Birkdale.* (9)

Poland, Q.C., replied.

(1) 8 E. & B. 469.
(2) 8 E. & B. 360.
(3) 3 T. R. 497.
(4) 3 East, 506.
(5) 4 M. & S. 317.
(6) 3 Q. B. 14.
(7) 3 E. & B. 346; 23 L. J. (M.C.) 69.
(8) 11 Q. B. D. 145.
(9) 19 Q. B. D. 280; 20 Q. B. D. 450.

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LAWRANCE, J. The main question which is raised for our decision in this case is whether a portion of certain premises which are described in the case is or is not rateable, that is, a part of a building of which the greater part is admittedly a storehouse within the meaning of the Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 26. The rateable value of the whole premises is 341*l.* 13*s.* 4*d.*, and the rateable value of the excepted parts is 66*l.* 10*s.* 1*d.* The question arises as to the excepted parts, namely, the officers' mess-room, the officers' ante-room, the canteen, the sergeants' room, the men's mess-room, and the two rooms on the third floor. The whole question as to this depends on what is the real position occupied by volunteers, that is, whether they are servants of the Crown, or are only persons voluntarily banded together for a particular purpose. On consideration of the provisions of the Volunteer Act, 1863, I am of opinion that they are servants of the Crown. By s. 2 of that Act, "It shall be lawful for Her Majesty to accept the services of any persons desiring to be formed under this Act into a volunteer corps, and offering their services to Her Majesty through the lieutenant of a county." These words shew that, except for the fact that volunteers are not paid as soldiers of the regular army are, but the corps only receives a Government grant, they are in the service of the Crown in the same way as soldiers of the regular army are. Again, by s. 12, the Crown can disband a volunteer corps; and by s. 17, in case of actual or apprehended invasion of the United Kingdom, the volunteers may be called out for military service. This puts them in a similar position to the militia, who, by 45 & 46 Vict. c. 49, s. 18, sub-s. 1, are liable to be embodied in case of imminent national danger. The property required for the use of a volunteer corps must be vested in some one, so by s. 25 it is vested in the commanding officer. By s. 26 the commanding officer has power to appoint a storehouse for the depositing and safe keeping of arms, ammunition, or stores. That is what has been done in the present case; and in the case stated for the opinion of the Court it is expressly found by the arbitrator that, for the purposes of the storehouse, the whole of the premises, except those parts to which I have already alluded,

are necessary and proper. On the part of the respondents a number of cases have been cited to shew that the premises are used in ways which are in excess of the mode of using them contemplated by s. 26, and therefore are not entitled to exemption. I am of opinion that the present case does not come under that principle at all. The premises are used for Crown purposes, and as if they were Crown property, for they are entirely occupied by the servants of the Crown and used for the purposes of the Crown. It is urged that the excepted parts to which I have referred do not come within the exemption provided by s. 26; but if that is so, I am of opinion that those parts come within the general exemption, which applies to all property which is occupied by the servants of the Crown for the purposes of the Crown.

For these reasons, I am of opinion that the whole of the premises are exempt from rates, and, the first question being answered in the affirmative, the assessment must be quashed.

COLLINS, J. I am of the same opinion. The question for decision is whether the premises described in the case are exempt from rates. Mr. Poland contends, first, that these premises are exempt on the ground that they come within the exemption contained in s. 26 of the Volunteer Act, 1863; and, secondly, that by the general law they are exempt. I am of opinion that Mr. Poland's contention is sound, and covers the whole of the premises. I am not sure that the whole of the premises are not within s. 26; but I am clear that the whole premises are either within that section or within the exemption, by the general law, of premises occupied by servants of the Crown for the purposes of the Crown. Sect. 26 gives power to appoint a storehouse, and exempts such storehouse from rates. It is expressly found in the case that "the primary purpose of the said premises is that of a storehouse for the guns, arms, and ammunition of the corps," and that "the said premises have been duly certified as a storehouse by the authorities pursuant to 26 & 27 Vict. c. 65, s. 26." That would seem to include all the premises; the arbitrator finds that the whole ambit of the

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house was appointed as a storehouse. Mr. Bosanquet contends that, if he can shew that a part was not in fact occupied as a storehouse, the exemption does not apply. To establish this contention, I think he must shew, first, that a part of the premises is not occupied as a storehouse, and, secondly, that it is beneficially occupied—that is, that the occupiers are in occupation not merely as servants of the Crown. I am not sure that the findings in the case preclude me from holding that the whole of the premises are within the exemption contained in s. 26. No doubt the finding that the excepted parts are not storehouses within the meaning of s. 26, looks, primâ facie, as if those parts of the premises were not within the exemption. Certainly they are not storehouses; but if it is necessary to have the three sergeants residing on the premises, their quarters are a necessary part of the building occupied as a storehouse. Now, it is expressly found that the military authorities insist, as a condition to the supply of the guns and the granting of the certificate, upon the presence of the three non-commissioned officers. This gives the three non-commissioned officers the right to have reasonable accommodation, and it follows as a necessary consequence that their quarters are reasonably necessary for the maintenance of the storehouse. I also think that the officers' mess-room and ante-room, and the men's mess-room and the canteen, are reasonably necessary for the same purpose. But, however this may be, I am of opinion that, even if the excepted rooms are not within the exemption in s. 26, they are exempt as being in the occupation of servants of the Crown for the purposes of the Crown. This depends on whether volunteers are servants of the Crown. It is necessary to consider whether, for the purpose of exemption from rates, they are in the same position as the regular army or the militia. It is clear that premises in the occupation of the regular army and the militia are exempt, and the question is, whether premises in the occupation of the volunteers are equally so. It is also clear that the premises are exempt so far as they are occupied for military purposes. The questions to be considered, therefore, are, first, whether, on the construction of the Act of Parliament,

the volunteers are in the same position as the regular army and the militia, and, secondly, whether these premises are occupied for military purposes. I answer both questions in the affirmative. Sect. 2 of the Act shews that a volunteer corps cannot be constituted by the mere will of the persons composing the corps, for it cannot be constituted unless the Queen accepts their services. Sect. 22 provides for the discipline of the permanent staff when not on actual military service. By s. 12, the Crown may disband a corps. By s. 13, the Crown may continue the services of existing corps. By s. 16, a secretary of state may make regulations for the government and discipline of the force. Sect. 6 provides that all volunteers shall take the oath set forth in the schedule to the Act, which is in these words: "I, A. B., do sincerely promise and swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, and that I will faithfully serve Her Majesty in Great Britain for the defence of the same against all her enemies and opposers whatsoever, according to the conditions of my service." It is true that until the volunteers are called out they are not under the Mutiny Act, except the permanent staff; but when they are called out for actual military service, by s. 23 they are in this respect on the same footing as the regular army. It follows, first, that volunteer purposes are military purposes, and, secondly, there is an express finding in the case that the whole of the premises are used solely for the purposes of the corps, and the colonel has no use or occupation of the premises other than as colonel commanding the corps and in discharge of his duties as such. That finding cuts at the root of the argument based on the authorities which were cited on behalf of the respondents, for facts are expressly found which negative beneficial occupation. It is not necessary to go through all the authorities, for it is clear law that the property of the Crown, if occupied for the purposes of the Crown, is exempt from rates, while at the same time property belonging to the Crown may be rateable if it is not occupied for Crown purposes. Those are the two principles, and all the decisions turn upon the question whether the particular case comes within one or other of those principles. Cases such as the case

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of the canteen: *Rex* v. *Bradford* (1), have no bearing upon the present case, for those cases turned on beneficial enjoyment, and where, as here, the occupation is for the purposes of the Crown, there is no beneficial enjoyment. In the case of the police-officer's house: *Martin* v. *Assessment Committee of West Derby* (2), the house in question was not geographically within the ambit of the buildings occupied as the police-station. Here the whole of the premises are within the ambit of one house.

For these reasons I am clearly of opinion that the whole of the premises are exempt.

Assessment quashed.

Solicitors for appellant: *Church, Rendell, Todd & Co.*
Solicitor for respondents: *John Rexworthy.*

P. B. H.

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Jan. 20;
Feb. 1.

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Metropolis—Building Acts—Building erected without Notice—Proceeding by District Surveyor after completion of Building—Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122), *ss.* 45, 46, 47, 105.

By s. 45 of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), if, in erecting any building, anything is done contrary to the rules of the Act, power is given to the district surveyor to give "the builder engaged in erecting such building" notice to cause anything done contrary to the rules of the Act to be amended; and, by s. 46, if the builder to whom such notice is given makes default in complying with such notice, a magistrate may, on the application of the surveyor, make an order requiring him to comply with it.

By s. 105: "In cases where any building has been erected . . . without due notice to the district surveyor . . . the time during which the district surveyor may take any proceeding or do anything authorized or required by this Act to be done by him in respect of such building . . . shall begin to run from the date of his discovering that such building has been erected."

After the completion of a building, which had been erected without due notice to and without the knowledge of the district surveyor, he discovered that it infringed the rules of the Act. He thereupon served the builder who had erected the building with notice under s. 45, calling upon him to render the building conformable to the rules of the Act, and, upon his failing to

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(1) 4 M. & S. 317. (2) 11 Q. B. D. 145.

comply with this notice, he obtained from a magistrate, under s. 46, an order requiring him to do so:—

Held, that ss. 45 and 46 only applied while the building was in course of erection, and that s. 105 did not enable the surveyor to take any proceeding under these sections when the building had been completed.

SPECIAL CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49.

In January, 1892, the appellant, who was a builder, was employed by one Tappin to erect for him a certain structure, which was found by the magistrate to be "a building" within the meaning of the Metropolitan Building Acts. The appellant did not give to the respondent, who was the district surveyor under the Metropolitan Building Act, 1855, for the district within which such building was to be erected, any notice pursuant to s. 38 of that Act; but he erected such building and completed it in March, 1892, and after that date he ceased to perform any work upon it. The respondent did not discover that the building had been erected until April, 1892. He thereupon gave the appellant a notice, under s. 45 of the Metropolitan Building Act, 1855, in the following terms: "With reference to the works at the building undermentioned, and now in progress under your superintendence as builder engaged in executing the same, I hereby give you notice that they are not conformable to the rules of the Building Act in the particulars hereunder stated, and I require you within forty-eight hours from the date hereof to render the same conformable to the rules of the said Act in such particulars . . . Particulars of work done contrary to the Act, and to be amended: The said building being enclosed with wood, and not enclosed with walls constructed of brick, stone, or other hard and incombustible substances, with proper footings and foundations, and the roof not externally covered with slates, tiles, metal, and other incombustible materials according to the statute. Particulars of work required to be done by the Act, and now to be done: The said building to be enclosed with walls constructed of brick, stone, or other hard and incombustible substances, with proper footings and foundations, and the roof externally covered with slates, tiles, metal, or other incombustible materials according to the statute."

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The appellant, not having complied with this notice, was summoned and appeared before a metropolitan police magistrate, who made an order requiring him to comply with the notice within twenty-eight days, but stated this case for the opinion of the Court. (1)

F. Low (*Macmorran*, with him), for the appellant. The magistrate was wrong in making the order. The proceedings were taken under ss. 45 and 46 of the Metropolitan Building Act, 1855. Those sections are only applicable where there is a building in course of erection: *Parsons* v. *Timewell*. (2) In this case the

(1) By the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), s. 45: "In the following cases, that is to say, if in erecting any building or in doing any work to, in or upon any building, anything is done contrary to any of the rules of this Act, or anything required by this Act is omitted to be done, or, in cases where due notice has not been given, if the district surveyor on surveying or inspecting any building finds that the same is so far advanced that he cannot ascertain whether anything has been done contrary to the rules of this Act, or whether anything required by the rules of this Act has been omitted to be done; in every such case the district surveyor shall give to the builder engaged in erecting such building, or in doing such work, notice in writing requiring such builder within forty-eight hours from the date of such notice to cause anything done contrary to the rules of this Act to be amended, or to do anything required to be done by this Act, but which has been omitted to be done. . . ."

By s. 46: "If the builder to whom such notice is given makes default in complying with the requisition thereof within such period of forty-eight hours, the district surveyor may cause complaint of such non-compliance to be made before a justice of the peace, and such justice shall thereupon issue a summons requiring the builder so in default to appear before him, and, if upon his appearance or in his absence, upon due proof of the service of such summons, it appears to such justice that the requisitions made by such notice or any of them are authorized by this Act, he shall make an order on such builder commanding him to comply with the requisitions of such notice, or any of such requisitions that may in his opinion be authorized by this Act, within a time to be named in such order."

By s. 105: "In cases where any building has been erected or work done without due notice being given to the district surveyor, the district surveyor may, at any time within one month after he has discovered that such building has been erected or work done, enter the premises for the purpose of seeing that the regulations of this Act have been complied with, and the time during which the district surveyor may take any proceeding or do anything authorized or required by this Act to be done by him in respect of such building or work shall begin to run from the date of his discovering that such building has been erected or work done."

(2) 44 J. P. 296.

building had been completed, and, at the time the notice was given by the respondent, the appellant was not a "builder engaged in erecting" the building. The respondent might, no doubt, proceed against the appellant under s. 41 for penalties in not giving notice to him under s. 38 before commencing work upon the building. It would be monstrous to hold that after a building had been completed, and the builder had ceased to have any right to be on the premises, the district surveyor, on discovering some defect, might compel the builder to re-enter on the premises and pull them down.

Daldy, for the respondent. The order of the magistrate was right. This building is undoubtedly dangerous, being constructed of inflammable material, and it is highly important that the district surveyor should have power to order such a building to be pulled down. No doubt ss. 45 and 46, standing alone, refer only to buildings in the course of erection; but s. 105 gives the surveyor power to act where a building "has been erected" without notice to him. In such a case, the surveyor can, upon discovering that the Act has not been complied with, take proceedings to compel the builder to remedy the non-compliance. If it were not so, the surveyor, who discovered the most serious defects in a building, would have no power to cause them to be remedied, if the building had been completed the day before he made such discovery. The cases where the discovery was not made until the building had changed hands would be rare; but unless s. 105 applies to cases where a building has been completed it can have no operation at all.

LORD COLERIDGE, C.J. This case does not seem to me to present any great difficulty. Mr. Daldy frankly admits that the contention which he puts forward lands him in extraordinary conclusions which it is difficult for the Court to arrive at. Here a building has been erected which, for the purposes of the argument, I will assume was one which, under the Act, could have been pulled down, if the proceedings had been taken in time. No notice had been given to the district surveyor under s. 38, and the building was commenced, and apparently completely erected, before the surveyor was aware of its existence at all. When,

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however, he did discover that the building had been erected, he gave notice, under s. 45, to the builder, requiring him to pull down the building. That notice would have been effectual if it had been given in time. The surveyor then, on the non-compliance of the builder with the notice, proceeded, under s. 46, to get an order from a metropolitan magistrate, commanding the builder to comply with the requirements of the notice. It is contended that s. 105 gave the surveyor power to take this course, although there was, at the time he gave the notice, no "builder engaged in erecting the building" within the terms of s. 45, and it is said that if we take a contrary view we shall be striking s. 105 out of the Act altogether. Sect. 105 provides that, in cases where any building "has been erected" without due notice being given to the surveyor, he may, within one month after he has discovered that such building has been erected, enter the premises for the purpose of seeing that the regulations of the Act have been complied with, and that the time during which he may take any proceeding authorized by the Act in respect of such building shall begin to run from the date of his discovering that such building has been erected. Now, what is the meaning in that section of "any proceeding"? That question throws us back on ss. 45, 46, and 47, to see what those proceedings are. Sect. 45 clearly only applies while the building is in course of erection, for it provides that the notice shall be given by the surveyor to "the builder engaged in erecting such building." So long as the building is in course of erection, the builder is responsible for any infringements of the Act; but it is a condition precedent to the application of ss. 45–47 that there should be a building in course of erection. In this case there was no building in course of erection. All the work had been done, and the building had been fully erected. To hold that when a building has been completed, and paid for, and sold, and possibly resold more than once, the surveyor might nevertheless act under these sections and cause it to be pulled down, without any compensation to the person, who had bought it in perfect good faith, and in ignorance that it had infringed the Act in its erection, would be a strong thing to say; but that does not exhaust the difficulty. The order is, by s. 46, to be made on the builder, and he is to be

commanded to do the requisite acts. Suppose that the builder has gone away, has retired from business and gone into the country, is he to be obliged to re-enter business in order that he may commit what would be a trespass in pulling such a house down? Or suppose that the builder who had erected the house is dead, would such an order go against his executors? It seems to me entirely out of the question. Mr. Daldy is obliged to admit that these cases would be within his contention; but he urges that such cases would be rare and unusual. If such cases might ever happen, that is, I think, sufficient to destroy his contention. Can we possibly suppose that the legislature deliberately intended such an outrage on the rights of property to be the result of this enactment? It seems to me altogether unreasonable to hold that parliament ever intended anything of the kind. Then it is said that the result of our view will be to do away with s. 105. I do not think so. In my opinion, s. 105 has abundant scope for its operation, without extending ss. 45 and 46 to cases where a building has been completed.

The point appears to have been decided in *Parsons* v. *Timewell* (1), where Lush, J., said distinctly that ss. 45 and 46 only applied where there was a building in course of erection. That is a distinct authority against the argument for the respondent, and even without any authority I must say that I should have come to the same conclusion. The order of the magistrate was wrong, and must be quashed.

CAVE, J. I am of the same opinion. I think that this is an extremely clear case. I never heard a more outrageous interpretation of an Act than that put forward by the respondent. The words of s. 45 are perfectly clear. The district surveyor is to give the notice, not to "the builder who has erected the building," not to "the builder who omitted to give notice to him," but to "the builder engaged in erecting such building." That builder is in a position to put things right in the building; and he may be compelled by the surveyor to do so. That seems clear and sensible enough. But it is suggested that s. 105 enables us to put a different and unnatural sense upon the words

(1) 44 J. P. 296.

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used in s. 45, and that unless we do so s. 105 is made of no effect. I do not see that at all. If at the time the surveyor makes the discovery there is a builder engaged in erecting the building, then the surveyor may proceed under s. 45. Sect. 105 will apply in many cases without giving rise to the absurd results which would follow from the respondent's contention. Suppose that, as might well be the case in consequence of the death or bankruptcy of some of the builders, two or three builders had been employed, which of them is the district surveyor to pursue in order to compel him to engage men to commit a trespass on the property of a person, who may be neither the person who has erected nor who has ordered the erection of the building?

I am clearly of opinion that this order must be quashed.

Order quashed.

Daldy, applied for leave to appeal.

LORD COLERIDGE, C.J. It is quite clear that there is no appeal in such a case.

Solicitor for appellant: *J. T. Ricketts.*
Solicitor for respondent: *W. A. Blaxland.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

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Nov. 30.

IN RE AN ARBITRATION BETWEEN KEIGHLEY, MAXSTED & CO. AND BRYAN DURANT & CO.

Arbitration—Award—Referring back Award—Discovery of Material Evidence after the making of Award—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 10.

Under s. 10 of the Arbitration Act, 1889, the Court or a judge has power to remit an award to the arbitrator for reconsideration where it appears that since the making of the award material evidence has been discovered which might have affected the arbitrator's decision.

Burnard v. *Wainwright* (19 L. J. (Q.B.) 423; 1 L. M. & P. 455) approved.

APPEAL of Keighley, Maxsted & Co. from the decision of a Divisional Court (Mathew and Bruce, JJ.), remitting an award to the appeal committee of the London Corn Trade Association.

The dispute arose out of a contract for the sale of a cargo of wheat made between Keighley, Maxsted & Co. as purchasers, and Bryan Durant & Co. as sellers, the purchasers having refused to accept the wheat when tendered to them. The contract contained a clause that all disputes arising out of it should be from time to time referred to two arbitrators, who should have power to call in a third, the award of any two of them to be binding and conclusive, with a proviso that in case either party should be dissatisfied with the award they might appeal to the appeal committee of the London Corn Trade Association, subject to the rules of that association. By those rules the appeal committee consists of twenty-five members, who in each case brought before it elect five members from their body, who hear the appeal, and who must confirm the award appealed against, unless four out of the five concur in reversing or varying it; the award of the appeal committee is then signed by the chairman of the body that heard the appeal, and is to be final and conclusive of the matter in dispute. The rules further provide that in case of the death, illness, &c., of any of the five members, the appeal committee shall from time to time elect a new member or members in his or their place.

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The dispute in the present case was referred under the rules to three arbitrators, who found in favour of the purchasers, and on an appeal by the sellers to the appeal committee the award of the arbitrators was confirmed, and an award to that effect signed by the chairman. Subsequently to the award, evidence was discovered which, as was alleged by the sellers, disclosed facts that were material to the question in dispute, and which, if they had been before the appeal committee, might have affected the decision; and it appeared from an affidavit of the sellers that one of the five members who heard the appeal had said that if the evidence had been before them his decision would have been affected.

It also appeared that one of the five members of the appeal committee who heard the appeal had died since the making of the award.

Upon the application of the sellers, Durant & Co., the Divisional Court, reversing the judge at chambers, made an order, under s. 10 of the Arbitration Act, 1889 (1), remitting the award to the appeal committee for reconsideration.

Cohen, Q.C., and *Carver*, for the appellants. The Court had no jurisdiction to remit the award under s. 10 of the Arbitration Act, which section gives no greater powers to the Court than those conferred on it by s. 8 of the Common Law Procedure Act, 1854. The cases have placed a limited interpretation on the last-named section, and the decisions in *Hodgkinson* v. *Fernie* (2) and *Dinn* v. *Blake* (3) shew the circumstances to which the section may be applied; in the latter case, Archibald, J., at p. 391, lays down exhaustively the cases in which an award may be sent back to the arbitrator in the following terms: "The only exceptions are where there is corruption on the part of the arbitrator, or excess of jurisdiction, or where the arbitrator himself admits that there is a mistake, and, as it were, craves the assistance of the Court in setting it right." It is clearly laid

(1) By s. 10 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), "In all cases of reference to arbitration the Court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire."

(2) 3 C. B. (N.S.) 189; 27 L. J. (C.P.) 66.

(3) Law Rep. 10 C. P. 388.

down in *Mills* v. *Master, &c., of the Society of Bowyers* (1), that s. 8 of the Common Law Procedure Act, 1854, does not authorize the Court to send back an award on other grounds than those which before the Act would have induced them to set it aside or to treat it as a nullity in an action brought to enforce it. The present is not such a case, for there has been no irregularity or misconduct, and the arbitrators have not invoked the assistance of the Court. *Burnard* v. *Wainwright* (2) is the only reported case where an award has been sent back to the arbitrator for reconsideration in consequence of the discovery of fresh evidence subsequently to the award, and in that case the arbitrators practically asked that it might be sent back to them.

Secondly, there are no arbitrators or umpire within the meaning of s. 10. It is a scheme of arbitration not provided for by the Act. To remit the award to the appeal committee would be to remit it to arbitrators who have not heard the case.

The death of one of the committee since the award makes it impossible to remit the award, for it can only be remitted to those who have heard the case, and a remission to the four survivors would not be a compliance with the rules governing the arbitration.

The evidence discovered since the award was not such as would be receivable in a court of law, and was therefore immaterial, and the Divisional Court wrongly exercised its discretion in sending the award back for reconsideration.

Finlay, Q.C., and *Pollard*, for the respondents, were not called upon.

LORD ESHER, M.R. I am of opinion that the appeal must be dismissed. The parties are related by a contract of purchase and sale, which is the only contract between them. A dispute arose with reference to that contract, the question at issue being whether the purchasers were bound to accept a quantity of wheat when tendered to them. In the contract the parties had agreed, in case a dispute should arise, to refer it to the arbitration of certain persons (who were, I suppose, members of the corn trade) as arbitrators and under certain conditions; if

(1) 3 K. & J. 66.

(2) 19 L. J. (Q.B.) 423; 1 L. M. & P. 455.

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no objection was taken by either party to the award, it was of course to be final; but if either party wished to take the matter to an umpire, or by way of appeal, as the parties call it, then the umpire was to be the appeal committee of the London Corn Trade Association. The case accordingly went to arbitration, and one of the parties, being dissatisfied with the award, wished the case to go before the umpire. Now, the parties had not only agreed that the committee should be the umpire, but they had agreed that it should act according to the rules of the London Corn Trade Association, which were well known; and when the committee, which consisted of twenty-five persons, came to be umpire, they, acting under their rules, exercised their duty by appointing out of their own body a committee of five to act as umpire in the dispute. And it may be noticed here that, by the rules, if one of the five members of the committee died before the matter was finally determined, another member of the body of twenty-five might be appointed in his place. These being the terms as to the decision of their dispute to which the parties agreed, they went before the committee of five, who were acting for the full committee as umpire; of these five one member died, and another can, if necessary, be put in his place. Before he died, however, there had been a determination of the dispute by the committee, which amounted to a determination by an umpire. Primâ facie, no doubt, this determination was final and conclusive, and was not subject to remission to the umpire by a court of law; but one of the parties made an application to the Queen's Bench Division to remit the award to the appeal committee under s. 10 of the Arbitration Act, 1889. Now, that there has been an arbitration, and that there has been a decision by the arbitrators and by the umpire, it is impossible to doubt, and the arbitration therefore comes within the provisions of that Act. We must see, therefore, whether the circumstances of the case are such as to justify the Court in remitting the award to the umpire for re-consideration.

The Arbitration Act, 1889, in great measure follows the provisions of the Common Law Procedure Act, 1854; if, therefore, any part of it is enacted in the same terms as those used in the Common Law Procedure Act, then, according to the rules which

govern the decisions of the Courts, if decided cases have determined the construction to be placed on the Common Law Procedure Act, we must adhere to those decisions when we are called upon to place a construction upon that part of the Arbitration Act in which the same language is used with regard to the same subject-matter. Now, the provisions of both these Acts as to referring back the decision of an arbitrator for reconsideration had their origin in the following reason, as has been frequently pointed out: previously to 1854 there had been in many cases submissions to arbitration containing a clause authorizing a reference back to the arbitrators; while in other cases there had been no such clause in the submission; and it had been decided that, in the absence of such a clause in the submission, the Court could not refer back the award, but where there was such a clause the award could be referred back, although only on certain specified grounds. The effect of both these Acts is to treat all submissions to arbitration (whether made by consent or compulsorily) as though they contained a clause giving the Court power to refer back the award to the arbitrator or umpire, and we must therefore consider the present arbitration as though it had been an old arbitration—that is to say, prior to 1854—and the submission had contained such a clause.

There have been many decisions upon the provisions relating to arbitration in the Common Law Procedure Act, 1854, and especially as to the right construction of s. 8, which gave power to the Court to remit the matters referred to the reconsideration of the arbitrator. It has been held that one effect of the Act was that it continued the ordinary law as to decisions by arbitrators, that is to say, that they are final and conclusive both of the law and of the facts, and that whether there has been a mistake either of law or fact the parties cannot by themselves set it up. Where, however, the submission contains a power to refer back to the arbitrator, if the party alleges that there has been a mistake on the arbitrator's part either of law or fact, the Court gives this effect to the power: that upon such a state of facts alone the decision cannot be questioned either on the law or the facts, the parties having chosen their arbitrator for better or worse; but that if the arbitrator himself informs the Court that he thinks

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he has made a mistake either of law or fact, and both he and the party approach the Court, the Court would send the matter back to him for reconsideration, although such a course will not be taken on the mere allegation of one of the parties. That was the law under the Act of 1854, and that is the view adopted in *Dinn* v. *Blake* (1), in which case it is said in terms that an award cannot be sent back to the arbitrator on the mere ground of mistake, the exceptions being where there has been corruption or fraud, where there is a mistake of law or fact apparent on the face of the award, and where the arbitrator himself admits that he has made a mistake. That law or rule of the Court, therefore, applies only where there is an allegation by the arbitrator that he has made a mistake of law or fact; and the case of *Dinn* v. *Blake* (1) is no authority for anything beyond.

In the present case there is no allegation of any mistake by the arbitrators during the progress of the arbitration; but it is said that all the case was not before them, further material evidence having since been discovered. Our decision to-day will apply only to cases where evidence has been discovered since the award, and we do not determine whether in other cases and under other circumstances the Court would be justified in sending back the award, as, for example, where the evidence was known to one of the parties, but kept back by him in order to deceive the arbitrator. The only questions here are, Has new evidence been discovered since the award was made, and is that a good ground for sending the award back, though the arbitrator has not asked us to interfere? Now, before the Act of 1854, this point was decided in *Burnard* v. *Wainwright* (2), and it was held that in such a case the Court had power to refer the award back to the arbitrator for reconsideration. In that case the submission contained a clause empowering the Court to remit the matters to the arbitrator, and it was therefore the same as all submissions are at the present day, for the effect of the Act of 1889 is that every submission must be taken to contain such a clause. Wightman, J., decided that if evidence were discovered after the decision of the arbitrator the Court might (though, of

(1) Law Rep. 10 C. P. 388. (2) 19 L. J. (Q.B.) 423; 1 L. M. & P. 455.

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course, it would not necessarily in every case) remit the matter for reconsideration, although in that case there had been no request of the arbitrator to that effect. That being the law at that time, we ought to adopt it now.

Has new evidence, then, been discovered in the present case which would justify us in sending the matter back? It has been argued that we ought not to remit the award unless the fresh evidence would be good evidence if the case were being tried in a Court of law. But the parties have agreed to go before an umpire, who is not bound by the strict rules of evidence enforced in a Court, and to be bound by his decision; and in my judgment the Court ought not to fetter the arbitrator or the parties by its own rules of evidence, but should consider whether something has been discovered since the award which the arbitrator might think material, and which might alter his decision. We cannot say what would alter an arbitrator's decision; but if the evidence discovered relates to the matter in dispute, whether in a Court of law it would or would not be evidence, the Court has, in my opinion, power to send an award back for reconsideration. In the present case the evidence which has been discovered most clearly relates sufficiently to the matter in dispute to justify us in remitting the award, the Court giving no intimation as to the effect to be given to the evidence. The Divisional Court, in the exercise of its discretion, thought that the case ought to be sent back to the umpire, and I should have come to the same conclusion. The judgment appealed against must, therefore, be affirmed.

LOPES, L.J. I am of the same opinion. The language of s. 10 of the Arbitration Act is very general and comprehensive, though I am not prepared to say that it is more comprehensive or of larger import than that of s. 8 of the Common Law Procedure Act, 1854. It appears to me that all the cases decided under the latter Act are applicable to cases arising under s. 10 of the Arbitration Act, and it is therefore material to consider both the law under the Common Law Procedure Act and the law that was in existence before that Act was passed.

The case of *Burnard* v. *Wainwright* (1), which was decided in

(1) 19 L. J. (Q.B.) 423; 1 L. M. & P. 455.

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1850, is an important one, and, in my opinion, governs the present case, for the same point arose in it which arises here. There was a clause in a submission empowering the Court to remit the matter to the arbitrator for reconsideration, together with a statement by the arbitrator that his judgment would have been affected by the evidence subsequently discovered. Those facts are very similar to those in the present case, for the Common Law Procedure Act, 1854, having done away with the necessity for having a clause in the submission authorizing the remission of the award to the arbitrator, the absence of such a clause in the present case makes no difference; and we have also in the present case a statement by one of the arbitrators that his judgment would have been affected by the evidence. In *Burnard* v. *Wainwright* (1) Wightman, J., does not seem to attach importance to the arbitrator's statement that the evidence would have affected his judgment; and it is material to observe that there was no affidavit of the arbitrator asking for the assistance of the Court or intimating an intention to ask for their assistance. The case of *Mills* v. *Master, &c., of the Society of Bowyers* (2) is a very valuable one, for that decision placed a construction on s. 8 of the Common Law Procedure Act, 1854, to the effect that it was no longer necessary to introduce into a submission a provision for remitting the award back to the arbitrator for reconsideration. The reason for this is explained by Wood, V.C., in these terms: "This 8th section is nothing more or less, as it appears to me, looking back to the history of what took place before the passing of the Act, than the introduction of a statutory enactment enabling the Court to do that which experience had shewn it was convenient it should have the power of doing, and which had frequently before been specially provided in orders of reference by the Court, and in submissions by consent between the parties, namely, that there should be a special power in the Court to remit the matters in question, or any of them, to the consideration of arbitrators, rather than set the whole award aside." It is clear, therefore, that since the Common Law Procedure Act, 1854, a submission to arbitration has the same effect whether it contains such a clause or not.

(1) 19 L. J. (Q.B.) 423; 1 L. M. & P. 455. (2) 3 K. & J. 66.

In 1875 was decided the very material case of *Dinn* v. *Blake* (1), which shews under what circumstances an award may be sent back to the arbitrator. Upon the authority of that case, if the point in the present case were that the arbitrator had made a mistake in law or fact, but there was no craving of assistance on his part, we could not send the award back. But the present case is, in my opinion, distinguishable from *Dinn* v. *Blake* (1), and is within the principle of the decision in *Burnard* v. *Wainwright* (2), for the ground of the power to remit is not that the arbitrator has made a mistake in fact or law, but that there has been a discovery of material evidence since he made his award. It seems to me, therefore, beyond question that there is jurisdiction in the Court to send back this award.

It is said that that jurisdiction ought not to be exercised; but it appears to me to be a case in which the Court may well exercise it, for I think it clear that fresh evidence has been discovered since the award was made. It is contended that the evidence is such as would not be received in a court of law, and that therefore the award ought not to be remitted; but in my opinion that contention fails. Where evidence is to be submitted to a lay arbitrator, he cannot look at it in the same light in which strictly legal evidence is regarded in a court of law; he looks at it as an arbitrator would look at it, and, if the evidence is such as he might receive and give effect to as an arbitrator, we should send the award back to him, although the evidence would not be admissible according to strict rules of law. I am not prepared to say that the evidence in this case might not be receivable as legal evidence: on that point I express no opinion. I have come, therefore, to the conclusion that the Court had jurisdiction to remit this award, and that the alleged evidence discovered since the making of the award was such as to justify the Court in sending it back.

KAY, L.J. This case is one of importance, bearing in mind how very material it is that an award, when once made, should be final. It is clear that s. 8 of the Common Law Procedure Act, 1854, which is substantially, though in different words, re-enacted

(1) Law Rep. 10 C. P. 388. (2) 19 L. J. (Q.B.) 423; 1 L. M. & P. 455.

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by s. 10 of the Arbitration Act, 1889, gave the Court a larger jurisdiction to interfere with an award than it had before. I am decidedly of opinion that it did not give an appeal to the Court from the arbitrator, and that an award cannot be set aside merely on grounds which satisfy the Court that it would not itself have made the award. What, then, was the effect of the section? It is difficult to lay down in precise terms the limit of the power of the Court, and we cannot do better than be guided by the previous decisions on these two sections.

The Courts have always been exceedingly cautious in dealing with awards. Primâ facie, an award is final and not subject to appeal; the arbitrator is chosen by the parties who presumably prefer a domestic tribunal which is not bound rigidly by the rules of evidence; and a mistake of law or fact is not, per se, a ground for sending back the award of such a tribunal. The cases lay down with sufficient clearness the rules on which the Court ought to act when asked to remit an award to enable us on this appeal to say that this case is brought within the rules. The ground upon which I have arrived at this conclusion is as follows: In *Dinn* v. *Blake* (1), which was decided after the Common Law Procedure Act, 1854, Archibald, J., specified the cases in which the power of sending back an award ought to be exercised; he confined them within rather narrow limits. But in *Burnard* v. *Wainwright* (2) the Court added one other case, which seems to be this: that when, after the award, further evidence is discovered which might, and probably would, influence the arbitrator's judgment, and which was not in fact before him, there may be a ground for remitting the award for reconsideration, and certainly will be a ground if the arbitrator says that in his view the evidence was material and might have affected his decision. In *Burnard* v. *Wainwright* (2) such a statement was made by the arbitrator; and in the present case nearly the same thing has happened, for it is stated in the affidavit that one of the arbitrators had informed the deponent that he considered the evidence to be of some weight. This case is, therefore, within *Burnard* v. *Wainwright*. (2) At that time (the Common Law Procedure Act of 1854 had not then been passed) there was

(1) Law Rep. 10 C. P. 388. (2) 19 L. J. (Q.B.) 423; 1 L. M. & P. 455.

a power in the Court, by agreement of the parties, to remit an award; but that power was not treated as giving the Court an absolute discretion to remit an award on any ground. But it was thought that a proper case in which to exercise that power was where evidence had been discovered since the award which might be material, and which the arbitrator thought to be so. The present case comes within that principle: the facts make it very analogous; and in remitting this award we shall not be extending the jurisdiction of the Court to remit, but shall only be following the decision in *Burnard* v. *Wainwright*. (1)

At present I am not inclined to go a step beyond those cases, or to say that there is a right of appeal; there is a limit to the jurisdiction, which must be looked for in those cases. It is not too much to say of *Mills* v. *Master, &c., of Society of Bowyers* (2), that it decides that one of the objects of the Common Law Procedure Act, 1854, was to prevent the necessity of putting into the submission a clause giving the Court power to remit. Before that Act there was no power, without such a clause, to remit an award; all that the Court could do was to set it aside, and there was a limit to the cases in which that could be done. And I think that the power now given by statute to remit an award cannot be exercised on grounds wider than those on which the Court could, before 1854, have remitted an award where the submission contained such a power.

Another point has been taken which is worthy of notice: that the evidence discovered is of such a nature that the Court would not treat it as evidence receivable in a Court of law, and that, therefore, the Court would be going too far if it were to hold that on the discovery of such evidence they might remit the award to the arbitrator. It is difficult to draw a hard-and-fast line in these matters. If, after an award were made, something were discovered which, if admitted as evidence, would cause injustice, the Court would certainly not exercise its power of remitting the award. But in the present case I agree with Lopes, L.J., and am not satisfied that the evidence would be inadmissible in a Court of law; and, therefore, I think that the Court may, on the subsequent discovery of this evidence,

(1) 19 L. J. (Q.B.) 423; 1 L. M. & P. 455. (2) 3 K. & J. 66.

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IN RE KEIGHLEY, MAXSTED & CO. AND DURANT & CO.

Kay, L.J.

as to the inadmissibility of which in a Court of law they are not satisfied, send back the award for reconsideration. I am not prepared to say that the Court would have no jurisdiction to remit the award even if the evidence were clearly not legal evidence, but were such as an arbitrator might receive. I should exercise the power in such a case with great reluctance; but the question does not at present arise.

There is only one other point to notice. The appeal was heard before five members of the committee, one of whom has since died, and it is contended that there can be no remission of the award to the five members who heard the appeal, and the materiality of the objection is that, by the rules, the decision must be that of four out of the five members. There is, however, another rule by which the vacancy may be supplied before the final award is made, and if this matter is remitted to the appeal committee there is at present no final award. The rule, therefore, applies to the present circumstances, and the vacancy created by the death of the member of the body who heard the appeal may be supplied.

Appeal dismissed.

Solicitors for appellants: *Simpson & Cullingford.*
Solicitors for respondents: *Freshfields & Williams.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1893
Jan. 11.

EX PARTE GOLDBERG.

Practice—Appeal—Jurisdiction of Court of Appeal—Application for Leave to Appeal in Formâ Pauperis.

Application for leave to appeal in formâ pauperis to the Court of Appeal by a party who has not sued or defended in formâ pauperis in the Court below, must be made ex parte to the Court of Appeal. Upon such an application the provisions of Order XVI., rr. 22, 23, 24, as to proceedings by or against paupers, must be followed by analogy, as though they were in terms made applicable to appeals.

In re Roberts, Kiff v. *Roberts* (33 Ch. D. 265) followed.

APPLICATION made ex parte for leave to appeal in formâ pauperis from the order of a registrar in bankruptcy. The applicant did not appear in formâ pauperis before the registrar, but in the ordinary way. For the purpose of the present application the applicant had obtained the opinion of counsel, and made the affidavits required by Order XVI., rr. 23, 24.

The applicant in person.

LORD ESHER, M.R. It is desirable that we should now lay down a clear rule for the guidance of the Court in future cases of this nature as to the proper Court to which such an application should be made. In the present case there has been an application in bankruptcy, and in those proceedings the present applicant appeared in the ordinary way, and not in formâ pauperis. He now desires to appeal from the registrar's decision, there being an appeal from the registrar to this Court. Nothing, however, turns on the appeal being one from the bankruptcy registrar, for the same question would arise in any appeal from any Court of first instance to this Court. I had at first some doubt whether this application ought to be made here or at chambers or elsewhere. As a general rule, the only jurisdiction of this Court is by way of appeal from a decision of some other Court; but as to the proceedings arising in an appeal, this Court has inherent jurisdiction as a Court to deal with them, for matters relating to an appeal to this Court are exclusively

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EX PARTE GOLDBERG.

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within its jurisdiction. Now the applicant is not asking for leave to sue, but to appeal in formâ pauperis, and with that application this Court has an inherent jurisdiction to deal, and no other Court has. The decision in *In re Roberts, Kiff* v. *Roberts* (1), is an authority for the proposition that this Court has authority to deal with such a matter; the minutes of the order drawn up in that case appear in the report, and shew that this Court did deal with it, and gave the applicant liberty to prosecute his appeal in formâ pauperis. Therefore the present application is made primarily in this Court, and not by way of appeal, and we will allow the applicant to proceed in this Court, but in this Court only, in formâ pauperis. This not being an appeal, but an original motion, and also made ex parte, it is unnecessary to give notice to the other side in order to enable the Court to deal with it. Whether our order could at a future time be challenged on the ground of the insufficiency of affidavits, or could be set aside on that or any other ground, I do not say. At present we must follow by analogy the practice prescribed in Order XVI., rr. 22, 23, 24, and we must see that the applicant has complied with those rules: that is what was done in *In re Roberts, Kiff* v. *Roberts* (1), a decision which we adopt, and follow in this Division of the Court of Appeal. We must require the applicant to comply with those rules which relate to suing and defending in formâ pauperis in the Courts of first instance, as fully as if they related also to appeals in this Court.

BOWEN, L.J. I agree.

KAY, L.J. I agree.

Leave granted.

(1) 33 Ch. D. 265.

W. J. B.

CROFT *v.* KING.

1893
Jan. 28, 30.

Practice—Writ of Summons—Service out of Jurisdiction—Ireland—Co-defendant within Jurisdiction—Action of Tort—Order XI., *r.* 1 (*g*).

By Order XI., r. 1, "service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the Court or a judge, (*g*) whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction":—

Held, that under clause (*g*) service out of the jurisdiction may be allowed in actions of tort.

APPEAL by Messrs. Frederick King & Co., Limited, against an order of a judge giving the plaintiff in an action for malicious prosecution brought against Frederick King, their managing director, who had been served within the jurisdiction, leave to serve them with a concurrent writ in Ireland. The appellants were a company incorporated under the Companies Act, 1862, having their registered office in Waring Street, Belfast, and also a place of business in Camomile Street, in the City of London. The plaintiff stated on affidavit that he had been twice prosecuted at the Central Criminal Court for offences against the Merchandise Marks Act, 1887, on the information of Frederick King, that the bills had been thrown out by the grand jury, and that he was informed and believed that he had been so prosecuted at the instance of Frederick King & Co.

J. E. Bankes, for the company. There was no power to make the order. It is contended that under Order XI., r. 1 (1), service

(1) By Order XI., r. 1, "Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the Court or a judge whenever—

"(*a*) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits); or

"(*b*) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction is sought to be construed, rectified, set aside, or enforced in the action; or

"(*c*) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or

"(*d*) The action is for the administration of the personal estate

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out of the jurisdiction cannot be allowed in actions of tort. The rule seems to have been thus interpreted by Huddleston, B., in *Lenders* v. *Anderson* (1), and by Cave, J., in *Field* v. *Bennett*. (2)

Willis, *Q.C.* (*Clydesdale*, with him), for the plaintiff. The order was properly made under clause (*g*) of Order XI., r. 1, the words of which are perfectly general.

DAY, J. I am of opinion that this appeal should be dismissed. There is no ground for the contention that a judge sitting at chambers cannot allow service out of the jurisdiction of a writ in an action of tort. By rule 1 of Order XI. an English writ may be served out of the jurisdiction in the cases specified in clauses (*a*), (*b*), (*c*), (*d*), (*e*), and (*f*), and also under clause (*g*), whenever a person out of the jurisdiction is "a necessary or proper party to an action brought against some other person duly served within the jurisdiction." In *Lenders* v. *Anderson* (1) the action was one of contract within clause (*e*), and the passage as to actions of tort which has been cited from the judgment of Huddleston, B., is in no sense a decision as to the effect of

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of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of England; or

"(*e*) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; or

"(*f*) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or

"(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

(1) 12 Q. B. D. 50.

(2) 1 Times L. R. 374; see also 56 L. J. (Q.B.) 89.

clause (*g*). I think that, under the circumstances stated in his affidavit, the plaintiff ought to be allowed to serve the company in Ireland, as a "proper party to the action" within the meaning of clause (*g*).

COLLINS, J. I am of the same opinion. The question is important. It has been repeatedly laid down by learned judges that the jurisdiction which the Court asserts over foreigners is to be exercised with the strictest regard to the conditions prescribed by the legislature; and a passage from the judgment of Huddleston, B., in *Lenders* v. *Anderson* (1), and an observation made by my brother Cave in *Field* v. *Bennett* (2), have been referred to as shewing that, in the opinion of those two learned judges, the power to allow service out of the jurisdiction in actions of tort was taken away by the Rules of 1883. In *Lenders* v. *Anderson* (1) Huddleston, B., said: "The power which previously existed of allowing service out of the jurisdiction in actions of tort is taken away except so far as such power is involved in clauses (*a*), (*c*), or (*f*) of Order XI., r. 1"; but this dictum is not an authority as to the effect of clause (*g*), to which the attention of the learned judge had not been directed in the argument. In *Field* v. *Bennett* (2), it appears that counsel stated that the practice under the new rule was to refuse leave to serve out of the jurisdiction in cases of tort, and that my brother Cave adopted the statement; but the report is a very short one, and cannot be accepted as an authority. Under Order XI., r. 1, of 1875, service out of the jurisdiction was allowed in actions of contract as in actions of tort; under Order XI., r. 1, of 1883, it is allowed in a number of cases which are specified, and generally under clause (*g*), "whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." The intention is to assist a plaintiff suing a defendant served within the jurisdiction by allowing him to add a person outside the jurisdiction as a co-defendant, and this assistance seems to me to be at least as much required in actions of tort as it is in actions of contract. I agree with my learned brother that the

(1) 12 Q. B. D. 50. (2) 1 Times L. R. 374; see also 56 L. J. (Q.B.) 89.

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effect of the plaintiff's affidavit is to shew that the company is "a proper party to the action."

Appeal dismissed.

Solicitors: *J. H. Johnson, Son, & Ellis; Hatchett-Jones & Co.*

H. D. W.

C. A.

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Feb. 6.

[IN THE COURT OF APPEAL.]

WILSON, SONS & CO., LIMITED *v.* BALCARRES BROOK STEAMSHIP COMPANY, LIMITED.

Practice — Parties — Non-joinder of Defendants—Foreigner resident out of Jurisdiction—Application to add as Defendant—Order XVI., *r.* 11*—Discretion—*3 *&* 4 *Wm.* 4, *c.* 42, *s.* 8.

Where an action was brought against one only of two joint contractors, the other being a foreigner resident out of the jurisdiction:—

Held, by the Court of Appeal (affirming the decision of Day and Collins, JJ.), that the defendant was not entitled as of right, under Order XVI., r. 11, to have the other joint contractor added as a defendant; and that, as a matter of discretion, the Court ought not, under the circumstances, to order that he should be added.

Semble, that Order XVI., r. 11, gives a discretion as to adding defendants; but as a rule such discretion ought to be exercised in accordance with the principles upon which, before the Judicature Act, a plea in abatement would have succeeded or failed.

APPEAL from the order of a Divisional Court (Day, J., and Collins, J.) setting aside an order made by Wright, J., at chambers.

The facts were as follows. The action was brought by the plaintiffs upon a contract by which the defendants and one Benier jointly agreed to guarantee the plaintiffs against certain disbursements. A steamship, of which the defendants were owners, had been chartered by the defendants to Benier, who was a foreigner resident at Antwerp, for a voyage from that place to Santos. The plaintiffs, who carried on business both in England and at Santos, and who had no previous connection with defendants or Benier, were employed to act as ship's agents, and also as charterer's agents, at Santos. Certain disbursements became necessary for lighterage and otherwise in relation to the ship's discharge at Santos. It appeared that there was some question

on whom the liability rested in respect of such disbursements. It was therefore agreed, in order to accelerate the discharge of the ship, that the plaintiffs should make such disbursements, and that the defendants and Benier should jointly guarantee repayment of them to the plaintiffs in this country. By the terms of such agreement, it was stated that the guarantee was given without prejudice to each party, and that they both reserved their respective rights.

An application was made by the defendants at chambers, under Order XVI., r. 11, for an order that Benier should be added as a defendant. Wright, J., at chambers, was unwilling, as a matter of discretion, to make the order applied for, but thought that he was bound to do so by the case of *Pilley* v. *Robinson*. (1) On appeal to the Divisional Court, they were of opinion that, Benier being a foreigner resident without the jurisdiction, the defendants were not entitled to have him joined as of right, and that, under the circumstances, the order ought not to be made. They, therefore, set aside the order.

T. G. Carver, for the defendants. If the joint contractor had been resident within the jurisdiction, the defendants would clearly have been entitled as of right to have him joined as a defendant under Order XVI., r. 11. *Kendall* v. *Hamilton* (2) and *Pilley* v. *Robinson* (1) shew that, though under the Judicature Act pleas in abatement are abolished, the right of a defendant to have a joint contractor joined as defendant was not intended to be taken away. At common law a defendant had an absolute right to compel joinder of a joint contractor as defendant by plea in abatement: *Sheppard* v. *Baillie*. (3) By 3 & 4 Wm. 4, c. 42, s. 8, it was provided that no such plea in abatement should be allowed unless the party whose non-joinder was pleaded was stated therein to be resident within the jurisdiction. There was at that time no power to issue a writ for service out of the jurisdiction. That enactment is no longer applicable, as pleas in abatement are abolished by Order XXI., r. 20. And now a writ may be issued for service out of the jurisdiction under Order XI., r. 1. This case falls within sub-ss. (*e*) and (*g*) of that rule; and,

(1) 20 Q. B. D. 155. (2) 4 App. Cas. 504. (3) 6 T. R. 327.

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therefore, it is a case in which a foreigner resident out of the jurisdiction can be sued: *Massey* v. *Heynes*. (1) That being so, the case stands thus: It is decided that the common law right of a defendant to have a joint contractor joined is not taken away by the Judicature Act; and the hardship which was formerly occasioned to plaintiffs by the fact that their action might be met by a plea in abatement, though the joint contractor was resident out of the jurisdiction, no longer exists, because the plaintiff can issue a concurrent writ for service out of the jurisdiction.

[LORD ESHER, M.R. He can ask for leave to issue it; but the granting of such leave is discretionary.]

The effect of the old law was that, subject to the difficulty as to proceeding against a person out of the jurisdiction, the defendant had a right to have a joint contractor joined as defendant. That difficulty of procedure is now got rid of by Order XI., r. 1.

H. F. Boyd, for the plaintiffs. No plea in abatement could have been pleaded in such a case as this before the Judicature Act, although by the Common Law Procedure Act power was given to allow the issue of writs for service out of the jurisdiction. Therefore, if applications under Order XVI., r. 11, to add defendants are to be dealt with on the footing that the joinder of defendants is a matter of absolute right to be determined with reference to the pre-existing state of the law, then clearly in this case the plaintiffs are entitled to sue the defendants alone, and the defendants are not entitled to have Benier joined. On the other hand, if there is a discretion under Order XVI., r. 11, then the Court will not interfere with the order of the Court below unless they can distinctly see that it was wrong. Wright, J., at chambers, clearly intimated that he would have refused the application if he had thought that he had a discretion. A plaintiff ought not to be forced to sue a foreigner resident out of the jurisdiction against his will. In order to do so, he must get leave to issue the writ for service out of the jurisdiction, and then there may be an application to set aside the writ and service with a series of appeals on such application. In a case like this, the plaintiffs ought not to be subjected to the delay and difficulty consequent upon having to join a foreigner as a de-

(1) 21 Q. B. D. 330.

fendant. The plaintiffs had no interest in the ship or charterparty, and the very object of the guarantee that they insisted on was that they might be able promptly to obtain repayment of the money advanced by them. The defendants can obtain any advantages which they could obtain by the joinder of Benier by bringing him in as a third party, which it has been held may be done with regard to a foreigner resident out of the jurisdiction: *Swansea Shipping Co.* v. *Duncan* (1); *Dubout & Co.* v. *Macpherson.* (2)

T. G. Carver, in reply. According to *Kendall* v. *Hamilton* (3), the matter is not one of discretion; but the Court is bound to act on the principles of the common law as to the right of a defendant to have a joint contractor made a co-defendant. The Act of Wm. 4 being no longer applicable, and the difficulties which it was intended to meet being no longer in existence, the Court is bound to decide the case according to those principles.

[BOWEN, L.J. It does not appear to have been decided in *Kendall* v. *Hamilton* (3) that the terms of Order XVI., r. 11, do not give a discretion. There may be cases in which, though a statute gives to judges a discretion, under certain circumstances it ought always to be exercised in one way. What was said in *Kendall* v. *Hamilton* (3) seems only to prove, that as a rule the discretion given ought to be exercised on the same principles as governed the old law with regard to pleas in abatement.]

In this case it is doubtful whether the defendants could bring in Benier as a third party, because it is doubtful whether it is a case for contribution or indemnity. The rights of the defendants against Benier depend upon the terms of the charterparty, and their only remedy would be to sue him on the charterparty.

LORD ESHER, M.R. In this case the plaintiffs have sued the defendants on a contract. It is not denied that it is the joint contract of the defendants and one Benier. An application was made at chambers for an order to compel the plaintiffs to join Benier as a defendant. What the judge at chambers said amounts, I think, really to this: that, if the matter were one of

(1) 1 Q. B. D. 644. (2) 23 Q. B. D. 340.
(3) 4 App. Cas. 504.

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discretion, under the circumstances of this case he should not make the order; but that he thought that the case of *Pilley* v. *Robinson* (1) determined that the matter was not one of discretion, but of absolute right, and consequently he was bound to make the order. Before the Divisional Court, as before the judge at chambers, it was argued for the defendants that they had an absolute right to the order. It appears that Benier, the joint contractor with the defendants, is a foreigner resident out of the jurisdiction. The questions are, first, whether, that being so, the defendants have an absolute right to an order that he should be joined as a defendant; and, secondly, whether, if the judge at chambers had a discretion, we can say that he would have been wrong in deciding, as I think it is clear he would have decided, if he had thought that he had a discretion. I think that, in entertaining the second question, we are treating the defendants with indulgence, because it seems to me that neither the judge at chambers, nor the Divisional Court, was ever asked to exercise a discretion in favour of the defendants; but it was contended that the defendants were absolutely entitled to the order.

With regard to the first point, by the common law, where one of two joint contractors was sued alone, the defendant had a right to compel the joinder of the other by means of a plea in abatement. But by the statute 3 & 4 Wm. 4, c. 42, s. 8, it was provided that no such plea should be allowed, unless the person whose non-joinder was pleaded were stated in the plea to be resident within the jurisdiction of the Court, and unless the place of his residence were stated with convenient certainty in an affidavit verifying such plea. Therefore, after the statute of William, if both the joint contractors were within the jurisdiction, there was a right to have the joint contractor joined, and a plea in abatement was a good plea; but, if the joint contractor who had not been sued was not resident within the jurisdiction, then a plea in abatement could not validly be pleaded. Then came the enactments of the Common Law Procedure Act, by which provision was made for service upon defendants without the jurisdiction; but they did not do away with the provisions of the statute 3 & 4 Wm. 4, c. 42, s. 8. Such was the state of

(1) 20 Q. B. D. 155.

things when the Judicature Act was passed. The provisions under that Act with regard to service of a writ, or notice of a writ, without the jurisdiction seem to me only to do on a somewhat more extended scale what the provisions of the Common Law Procedure Act did before. Under the Judicature Act pleas in abatement are abolished, and therefore the provision of the Act of Wm. 4 can no longer have any direct application. But it was not intended by the Judicature Act to alter people's substantive rights. A larger power was given to the Court by the new procedure as to joinder of parties; but that procedure ought, as it seems to me, to be administered with regard to the principles of the old law on the subject. Therefore, where there are two joint contractors, both resident within the jurisdiction, I think that primâ facie, if one of them is sued on the joint contract, he would have a right to have the other made a co-defendant. Order XVI., r. 11, so far as its terms are concerned, gives a discretion. It is not necessary to say that, even where all the joint contractors are within the jurisdiction, there might not be circumstances under which the Court could refuse to insist on their all being joined as defendants. It is not necessary to decide that point in this case. I doubt whether in extreme cases the Court would be bound, even in that case, to order the joinder of a joint contractor; but, as a general rule, I should say the Court would be bound to do so. In the case of one of two joint contractors being resident without the jurisdiction, before the Judicature Act the defendant could not plead in abatement, and the plaintiff therefore could not be forced to join such joint contractor as a defendant, but might proceed against the other joint contractor alone. In this case, too, carrying out the discretionary procedure given by the Judicature Act in the same manner as before, I should say that, though there might in such a case be a discretion to order the joint contractor to be joined, the discretion ought to be exercised as nearly as possible in accordance with the previously existing law as applicable to the rights of the parties. There is no longer any rule of law absolutely preventing the Court from ordering the joinder of the joint contractor in such a case. There is a discretion; and, therefore, if one of two joint contractors were resident out

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of the jurisdiction, but the circumstances were such that the joinder of such joint contractor could not possibly delay the plaintiff or cause any real hardship or difficulty to him, the Court, I apprehend, would have a discretion to make an order that he should be joined; but I think that such a discretion ought to be exercised with the very greatest caution. To say that, although a joint contractor is resident abroad, there is an absolute right to have him joined, gives rise to many difficulties, which I have pointed out during the argument. Suppose the Court to have ordered that such a joint contractor should be joined. He must then be served; but a writ cannot be issued for service out of the jurisdiction without the leave of the Court. The Court has a discretion with regard to granting that leave. So the Court might be in this difficulty: After ordering that he should be joined, when leave was asked to issue a writ for service upon him out of the jurisdiction, or of which notice was to be given to him out of the jurisdiction, the Court might find, when the circumstances were brought before them upon that application, that it would be unjust and improper to give such leave, and they might refuse it. I think, therefore, that it was a matter of discretion whether the order should be made. It does not appear that by leaving the defendants to their remedy over against Benier, if they have any, we shall be doing any injustice to the defendants. If Benier is a joint contractor with them, it would seem that there must be a right of contribution, and therefore the defendants could bring him in as a third party. If there is no right of contribution, then I cannot help thinking that the defendants are endeavouring to put on the plaintiffs the burden of suing a foreigner out of the jurisdiction for no real legal benefit to themselves, but for some indirect purpose. If the matter be one of discretion, we know how the judge at chambers would have exercised such discretion, if he had thought he possessed it, and what the Divisional Court thought on the matter, and I am not prepared to differ from them. For these reasons, I think the appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. The provisions of the statute 3 & 4 Wm. 4, c. 42, s. 8, were intended to mitigate

the rigidity of the common law with regard to the non-joinder of defendants, and the hardship that was thereby occasioned to plaintiffs. At common law, if the plaintiff wished to sue on a contract made by joint contractors, he was bound to sue all the joint contractors. If he did not, his action might be met by a plea in abatement, and he might be compelled to join all the joint contractors as defendants, whether resident within the jurisdiction or not. The statute altered that state of the law, and provided that no such plea in abatement should be allowed unless the person whose non-joinder was pleaded were stated in the plea to be resident within the jurisdiction, and unless the place of his residence were stated with convenient certainty in an affidavit verifying such plea. Therefore, after the statute, the plaintiff could be compelled to join all the joint contractors where all were resident within the jurisdiction: he could not be compelled to do so where all were not resident within the jurisdiction. Then came the Judicature Act, under which pleas in abatement were abolished. But its provisions were intended to alter the form rather than the substance of the law. It is still the right of a defendant in a sense to ask to have all those who have contracted jointly with him sued at the same time as himself, subject, however, to the mitigation of the law introduced by the statute 3 & 4 Wm. 4, c. 42. Lord Cairns, L.C., pointed out in *Kendall* v. *Hamilton* (1), that the Judicature Act has given the means of effecting the same end substantially as was effected by the old law; and, though the plea in abatement is abolished, the power of applying to the Court to compel the joinder of a joint contractor as defendant still remains; and he said in substance, no doubt with justice, that ordinarily, where all the joint contractors are within the jurisdiction, all ought to be sued; but he never said that the substance of the old law was affected by the procedure under the Judicature Act which enables defendants without the jurisdiction to be served. Unless we can see that it is just that we should compel a plaintiff who is suing one of two joint contractors to sue the other who is without the jurisdiction, and who conceivably might have to be pursued to the ends of the earth, we ought not to do so. We are not bound to

(1) 4 App. Cas. 504.

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Bowen, L.J.

do so, because the terms of the rule give us a discretion; and I should hesitate long before compelling a plaintiff to pause in his pursuit of one joint contractor within the jurisdiction until he has chased the other who is beyond the jurisdiction. It was not the law before the Judicature Act that the plaintiff could be compelled to do so, and I cannot think that it is so after. With regard to the question of discretion, I have nothing to add. It seems to have been the view both of Wright, J., at chambers, and the Divisional Court, that as a matter of discretion the order ought not to be made. If the defendants have a right to contribution from Benier, they are not injured; if it be true that they have no such right of contribution, then that fact throws an unfavourable light upon their object in making this application.

A. L. SMITH, L.J. The question that arises is whether, when a plaintiff sues one of two joint contractors who is resident within the jurisdiction, the defendant can compel him to join as defendant the other joint contractor, although he is resident out of the jurisdiction. Wright, J., at chambers, seems to have thought that he was bound by the case of *Pilley* v. *Robinson* (1) to make the order applied for. But, on looking at that case, it seems to me that it is distinguishable. There a plaintiff was suing one of several joint contractors, who all appear to have been resident within the jurisdiction. Whether it be a matter of absolute right or not, I think that in such a case the defendant is ordinarily entitled to claim that the plaintiff should be made to sue the other joint contractors jointly with him; just as under the old law he could have compelled a plaintiff to do so by means of a plea in abatement. But that is not the present case. Here the defendants say that they are entitled to compel the plaintiffs to join as defendant a joint contractor who is resident out of the jurisdiction, although no plea in abatement could have been pleaded in such a case. Under the Judicature Act pleas in abatement are abolished, and by Order XVI., r. 11, jurisdiction is given to order all necessary parties to be joined. By that rule a discretion is given; and, although I do not say that there may not be some cases in which a defendant could succeed

(1) 20 Q. B. D. 155.

in obtaining an order that a joint contractor resident out of the jurisdiction should be joined, in this case I am not prepared to differ from Wright, J., who clearly would not, as a matter of discretion, have made this order, or from Day, J., and Collins, J., who also thought it ought not to be made. For these reasons, I agree that the appeal must be dismissed.

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WILSON, SONS & Co. v. BALCARRES BROOK STEAMSHIP COMPANY.

Appeal dismissed.

Solicitors for plaintiffs: *Ince, Colt, & Ince.*

Solicitors for defendants: *Wynne, Holme, & Wynne, for Simpson, North, & Johnson, Liverpool.*

E. L.

WITTED *v.* GALBRAITH AND OTHERS.

1893 *Feb.* 20, 21.

Practice — Service out of Jurisdiction — Co-Defendants within Jurisdiction —"Action properly brought"—Rules of Supreme Court, 1883, *Order* XI., *r.* 1 (*g*).

Order XI., rule 1 (*g*), by which service out of the jurisdiction of a writ of summons may be allowed whenever "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction," applies where a plaintiff, acting bonâ fide, and not proceeding against the person who is served within the jurisdiction solely for the purpose of bringing in the person out of the jurisdiction, has, at the time of service of the writ, an apparent cause of action against the person served within the jurisdiction, and, therefore, in such a case, service on the person out of the jurisdiction may be allowed.

The rule applies where it appears, at the time of the service of the writ, that the plaintiff has an alternative claim against either the person within the jurisdiction or the person out of the jurisdiction, though it cannot be ascertained until the trial which of the two is liable.

MOTION to set aside a writ of summons, and the service of the writ out of the jurisdiction.

The action was brought under Lord Campbell's Act (9 & 10 Vict. c. 93) to recover damages for the death of the plaintiff's husband.

The writ was in the first instance served upon the defendants Galbraith, Pembroke & Co., who were shipbrokers carrying on business in London. The vessel *Queen Adelaide*, owned by the defendants Dunlop & Sons, who carried on business at Glasgow, came into the South Dock at Millwall, and the defendants

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Galbraith, Pembroke & Co., acting as shipbrokers, applied to the dock company to have the vessel unloaded. The plaintiff's husband, a stevedore in the service of the dock company, went on board the vessel to take part in the unloading, and was killed by falling down a hatchway, which, it was alleged, was insufficiently protected.

The plaintiff, having served the writ on Galbraith, Pembroke & Co. within the jurisdiction, applied ex parte to Bruce, J., at chambers, and obtained an order allowing service of the writ under Order XI., rule 1 (*g*) (1), upon Dunlop & Sons, the shipowners, at Glasgow, out of the jurisdiction.

Dunlop & Sons took out a summons to set aside the writ and service, and Kennedy, J., referred the matter to the Court.

Hollams, for the defendants Dunlop & Sons, in support of the motion. It lies on the plaintiff to shew that the case comes within Order XI., rule 1 (*g*), and the proof as to this fails, for the plaintiff does not shew that the action was "properly brought" against the brokers. In order to make the rule applicable, it is not sufficient to allege a claim against, and serve a writ upon, a person within the jurisdiction. Some ground for the claim must be shewn, and here it is quite consistent with the facts that the English brokers are sued, not with any hope of recovering against them, but solely for the purpose of bringing the Scotch shipowners before the English Court. This is an improper use of the rule, and the writ and service ought to be set aside.

Coleridge, Q.C. (*W. Howland Roberts*, with him), for the plaintiff. The action is properly brought against the brokers. The plaintiff's husband was invited to go on board the ship, which was in an unsafe condition, in consequence of which he was killed. This brings the case within the principle of law stated by Brett, M.R., in *Heaven* v. *Pender* (2), where he said: "The proposition which these recognised cases suggest, and which is,

(1) By the Rules of the Supreme Court, 1883, Order XI., rule 1, "service out of the jurisdiction of a writ of summons . . . . may be allowed by the Court or a judge whenever . . . . "(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

(2) 11 Q. B. D. 503.

therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." (1) The plaintiff cannot ascertain for certain who was guilty of the breach of duty until the facts come out at the trial, and is, therefore, entitled to put forward an alternative claim, alleging that either the brokers or the owners must be liable.

[HAWKINS, J. If the claim against the person within the jurisdiction were not bonâ fide—that is, if it were clearly apparent that such person were being sued for no other purpose than to enable the plaintiff to bring the person who was out of the jurisdiction before the English Court—then I should say the service ought to be set aside; but, on the other hand, the Court cannot try the case on a motion such as this, and, therefore, it cannot be necessary for the plaintiff to shew that the claim against the person within the jurisdiction is one which must ultimately succeed.]

For the purpose of determining whether Order XI., r. 1 (*g*), is applicable, the time to be looked at is the time when the writ is served: *Massey* v. *Heynes*, per Lord Esher, M.R. (2) Therefore, whoever may turn out at the trial to be liable, the action is "properly brought" against the brokers.

[He was stopped.]

HAWKINS, J. I am of opinion that the case which has been cited (*Massey* v. *Heynes* (3)) is an authority in favour of the contention on behalf of the plaintiff in the present case, which is that the action is "properly brought," within the meaning of Order XI., r. 1 (*g*), against the shipbrokers, and, therefore, the plaintiff is entitled to serve the writ out of the jurisdiction on the shipowners, as being necessary or proper parties to the action.

(1) 11 Q. B. D. at p. 509. (2) 21 Q. B. D. 330, at p. 338.
(3) 21 Q. B. D. 330.

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Hawkins, J.

Apart from authority, I should have come to the same conclusion. I think that, if a plaintiff, who is acting bonâ fide, has anything like a semblance of a cause of action against a person who is within the jurisdiction, he is entitled to issue a writ against that person and serve it on him, and may then obtain leave to serve any person out of the jurisdiction who is a necessary or proper party to such action. The case also stands thus: a plaintiff may have a semblance of a cause of action, but he may be in doubt as to which of two defendants is liable. It may be a case in which both defendants cannot be liable, but one or the other clearly must be, and, in such a case, before the facts are known, the plaintiff cannot tell which of two doubtful defendants he ought to sue. He cannot make his final selection without knowing the facts, and the facts cannot be ascertained until the case is tried.

For these reasons I am of opinion that the writ in the present case was properly issued.

LORD COLERIDGE, C.J., concurred.

Motion refused.

Solicitor for plaintiff: *F. Deakin.*

Solicitors for defendants: *Hollams, Son, Coward, & Hawksley.*

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
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Feb. 22, 23.

TEMPERTON *v.* RUSSELL AND OTHERS.

Practice—Parties—Persons having the same Interest in One Cause or Matter—Suing One of a Number of Persons on behalf of all—Trade Union—Action for Maliciously procuring Breaches of Contract—Order XVI., *r.* 9.

Order XVI., r. 9, provides that, where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested.

The writ of summons in an action stated that the plaintiff sued the defendants, who were respectively the officers of several trade unions, as well on their own behalf as on behalf of and representing all the members of each of the societies to which they respectively belonged. The action was for maliciously and wrongfully procuring and coercing persons, who had entered into contracts with the plaintiff, to break such contracts and to refuse to enter into other contracts with the plaintiff, and for conspiracy to injure the plaintiff. The plaintiff claimed damages and an injunction:—

Held, affirming the decision of a Divisional Court, that the case was not within Order XVI., r. 9, and the writ must be amended by striking out the words indicating that the defendants were sued in a representative capacity.

Order XVI., r. 9, applies only to persons who have or claim some proprietary right, which they are asserting or defending in the cause or matter.

APPEAL from the order of a Divisional Court directing an amendment of the writ.

The action was by the writ expressed to be "between Joseph Temperton, plaintiff, and J. Russell, president, and H. Stephenson, secretary, of the Hull branch of the Operative Builders' Society; J. Belt, president, and W. Byrne, secretary, of the Hull branch of the Builders' Labourers' Society; C. Clark, president, and John Trueman, secretary, of the Hull branch of the Operative Plasterers' Society; E. Annis, president, C. Clark, vice-president, and J. Devine, secretary, of the joint committee of the Hull branches of the Operative Bricklayers', Builders' Labourers', and Operative Plasterers' Societies (as well on their own behalf as on behalf of and representing all the members of each of the said societies and joint committee to which they respectively belong), and J. Russell, H. Stephenson, J. Belt, W. Byrne, C. Clark, John Trueman, E. Annis, and J. Devine, defendants." It appeared from the indorsement on the writ and also from

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the statement of claim, that the claim of the plaintiff, who was a builder at Hull, against the defendants was in substance for damages for maliciously and wrongfully procuring certain persons to break contracts into which they had entered with the plaintiff, and not to enter into other contracts with the plaintiff; for maliciously and wrongfully enticing and procuring certain workmen in the employ of the said persons to leave the service of their employers, and to break their contracts of service, with intent to injure the plaintiff, and to prevent the said persons from carrying out their contracts with the plaintiff, or entering into other contracts with the plaintiff; for maliciously and wrongfully intimidating the said persons and coercing them to break their contracts with the plaintiff and not to enter into other contracts with the plaintiff, and intimidating the servants in their employ and coercing them to leave the service of their employers, to the injury of the plaintiff; and for unlawfully conspiring together and with certain other persons to do the acts aforesaid with intent to injure the plaintiff; and the plaintiff also claimed an injunction to prevent the continuance and repetition of the matters complained of.

An application was made, on behalf of the defendants Russell and Stephenson, to strike out of the writ the words in brackets. The master refused the application, and the judge at chambers on appeal affirmed his decision; but the Divisional Court (Lord Coleridge, C.J., and Hawkins, J.), on appeal to them, granted the application.

Channell, Q.C., and *Montague Lush*, for the plaintiff. This case comes within the terms of Order XVI., r. 9. The members of the trade unions, whom the plaintiff seeks to sue through the defendants as their representatives, are in substance claiming a right in their own interests to interfere with the plaintiff's business in the manner complained of; while on the other hand the plaintiff asserts that the course pursued by them is an illegal infringement of his rights. There is, therefore, a question of legal right between the plaintiff and a numerous body of persons who have the same interest in the cause or matter. The words are not "the same interest in a subject-matter," but "the same

interest in the cause or matter." That means the proceeding that is pending. Here the societies, of which the defendants are officers, have the same interest with them in the proceeding. The object of the rule was, that in such a case a plaintiff might not be obliged to sue and set out the names of a numerous body of persons, which might be very difficult or impossible; and, practically, if such a case is not within the rule, a person injured through the action of a trade union can have no redress against them, for the case is not within the 9th section of the Trade Union Act, 1871 (34 & 35 Vict. c. 31), which in some cases permits the trustees of a trade union's property to be sued. The individual officers or members of such a society, who have actually done the acts complained of, may not be worth suing; and, unless the society and its funds can be got at, there will be no remedy. Of course it would be necessary for the plaintiff at the trial to prove that the members of the trade unions, as whose representatives he sues the defendants, really authorized the acts of which he complains. The action is mainly for an injunction. The rule was intended to embody the old Chancery practice, and in the Court of Chancery the course in such cases was to sue one of a body of persons who had a similar interest: see *Springhead Spinning Co.* v. *Riley* (1), where the prayer of the bill was that the defendants, as well on their own behalf as on behalf of all other the members of their association, might be restrained from interfering with the plaintiffs' business; see also *Pare* v. *Clegg* (2); *Bromley* v. *Williams* (3); *Commissioners of Sewers of the City of London* v. *Gellatly* (4); *Commissioners of Sewers of the City of London* v. *Glasse* (5).

E. Morten, and *L. G. Pike*, for the defendants Russell and Stephenson, were not called upon.

The judgment of the Court (Lord Esher, M.R., Lindley, L.J., and Bowen, L.J.), was delivered by

LINDLEY, L.J. The question, whether the defendants can be sued in the manner in which they have been sued, depends upon

(1) Law Rep. 6 Eq. 551.
(2) 29 Beav. 589.
(3) 32 Beav. 177.
(4) 3 Ch. D. 610.
(5) Law Rep. 7 Ch. 456.

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the terms of Order XVI., r. 9, which provides that "where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested." The question really turns on the meaning of the words "having the same interest in one cause or matter." This expression only extends, we think, to persons who have or claim some beneficial proprietary right, which they are asserting or defending in the cause or matter. The plaintiff in this case sues for damages, and the action, assuming it to lie at all, as to which we pronounce no opinion, is founded on tort. The old Court of Chancery had no jurisdiction to grant relief in such an action; and, although its rules as to parties to actions or suits maintainable in it have now to be applied in all Divisions in the High Court when exercising the old jurisdiction of the Court of Chancery, the rules ought not to be construed as creating a jurisdiction in one Division, which was never exercised by any Court in the country before the rules were made. But then the plaintiff asks for an injunction. This is an equitable remedy. But a suit for an injunction in such a case as this, even if maintainable at all, certainly could not be so framed as to bind persons not actually parties to it. What right is it which the plaintiff asserts? It is a right not to be molested in the conduct of his business. Who are the persons against whom he seeks redress? They are a number of persons belonging to various trade unions acting more or less in concert; but the persons assumed to be represented by the officers of those trade unions have no such interest as is contemplated by the rule as above explained. The truth is that this is an attempt to stretch the rule to cases to which it is wholly inapplicable, and the attempt is only plausible by reason of the ambiguity of the expression "same interest." The case of *Springfield Spinning Co.* v. *Riley* (1), relied on by the plaintiff's counsel, is no authority for them. In the first place the case was overruled by the Court of Appeal in *Prudential Assurance Co.* v. *Knott* (2), and in the next place the suit was not in form a suit against the defendants as representing others,

(1) Law Rep. 6 Eq. 551. (2) Law Rep. 10 Ch. 142.

although the prayer was for an injunction against them in that character. The point now raised could not arise, and did not arise in that case on demurrer, for it was no objection to a bill in equity that, besides a relief which might lawfully be claimed, it claimed also a relief which was impossible.

The words struck out by the Divisional Court ought never to have been inserted, and the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Bell, Brodrick, & Gray, for J. T. & H. Woodhouse, Hull.*

Solicitors for defendants: *Shaen, Roscoe, Massey & Co.*

E. L.

BRADLEY *v.* CHAMBERLYN.

1893 *Jan.* 20.

Practice—Specially indorsed Writ—Leave to sign Judgment—Averment of Condition Precedent—Order III., *r.* 6—*Order* XIV., *r.* 1.

The indorsement upon a writ of summons stated that the plaintiff's claim was for a sum of 210*l.*, payable under an agreement, which was set out, and by which the defendant undertook, upon the plaintiff delivering up to the defendant's husband certain acceptances, to pay to the plaintiff on demand 210*l.*, owing by her husband to the plaintiff for cash advanced:—

Held, that the indorsement constituted a good special indorsement within Order III., r. 6, although it contained no averment that the bills had been delivered up by the plaintiff to the defendant's husband.

APPEAL from an order of Wright, J., at chambers, reversing an order of the master by which leave had been given to the plaintiff to sign final judgment under Order XIV., r. 1.

The action was brought against the defendant, a married woman, in respect of her separate estate; the indorsement on the writ was in the following terms:—

"The plaintiff's claim is 210*l.*, payable to the plaintiff on demand under an agreement bearing date June 21, 1892, made by the defendant in favour of the plaintiff for value. Particulars: October 13, 1892. To amount due, 210*l.* The following is a copy of the said agreement:—

"To A. M. Bradley, Esq. June 21, 1892.

"Dear Sir,—If you will deliver to my husband, Mr. A. H.

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Chamberlyn, the three bills you hold accepted by Edwards and Chatterton, I undertake to pay you on demand the sum of 210*l.*, which he owes you for cash advanced.

"Yours truly,

"May Chamberlyn.

"The defendant is sued in respect of her separate estate possessed by her at the time the above agreement was signed by her."

The learned judge was of opinion that the writ was not specially indorsed, there being no allegation that the plaintiff had delivered the bills to the defendant's husband, and, therefore, no averment of the performance of a condition precedent to the accrual of a cause of action on the agreement, and gave leave to defend; the plaintiff appealed.

The defendant made no affidavit of merits, either at chambers or upon this appeal.

Oswald, for the plaintiff. The writ is specially indorsed under Order III., r. 6; it is not necessary in an indorsement to aver the performance of conditions precedent.

[COLLINS, J. In an action against the drawer of a cheque, an averment that notice of dishonour has been given is an essential part of the special indorsement: *Fruhauf* v. *Grosvenor* (1). How does that differ from the averment of any other condition precedent?]

The reason is that a cheque is a bill of exchange, and notice of dishonour is necessary to charge the drawer. In the present case the indorsement shews a specific sum payable by the defendant to the plaintiff under an agreement between them, and is sufficient.

[COLLINS, J. The decision in *Satchwell* v. *Clarke* (2) is in your favour.]

Yes; that shews that where the assignee of a mortgage debt sues the debtor, it is unnecessary to aver in the indorsement that express notice in writing of the assignment has been given to the defendant. It was never intended that the facts should

(1) 8 Times L. R. 744. (2) 66 L. T. (N.S.) 641.

be pleaded with as much particularity in an indorsement as in a statement of claim.

Mayer, for the defendant. The writ is not specially indorsed, for the delivery up of the bills by the plaintiff is a condition precedent to any cause of action against the defendant, and in the absence of an averment that they have been delivered up, the indorsement on the face of it shews no cause of action. Effect must be given to the requirement of Order XIV., r. 1, that the plaintiff's affidavit must verify the cause of action; that must mean that it is to verify the facts alleged in the indorsement to constitute a cause of action; all facts necessary to the cause of action should, therefore, be alleged in the indorsement.

DAY, J. I am clearly of opinion that this appeal must be allowed.

COLLINS, J. I am of the same opinion. The question is whether the writ is a specially indorsed writ, and the only objection taken to it is that it contains no averment of the performance of conditions precedent to the creation of a debt for money due under the agreement. It seems to me that there is no authority which binds us to hold that such an averment is necessary, and it also seems clear that, unless there is such an authority, this is a good special indorsement. This is a case in which, before the Judicature Acts, the sum due might be recovered under the money counts if the condition had been performed in fact. The indorsement is for a sum of 210*l.*, money payable under an agreement which is set out. If, in the absence of any authority the other way, it is necessary to look for any authority in the plaintiff's favour, it may be found in *Satchwell* v. *Clarke* (1), which decides that a writ may be specially indorsed, although it does not contain an averment which would be material in a statement of claim. There the assignee of a mortgage debt brought an action against the debtor without averring on the writ that he had given the defendant express notice of the assignment—a notice which

(1) 66 L. T. (N.S.) 641.

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would be necessary in a statement of claim; but the Court held that it was not a necessary averment in a specially indorsed writ. Therefore, this is a good special indorsement notwithstanding the absence of an averment of the performance of the condition. The defendant has come to the Court without an affidavit of merits, relying solely on his legal position, and it is now too late, after relying merely on legal technicalities, to turn round and ask leave to make an affidavit of merits. The appeal must, therefore, be allowed. The only reason why I add anything to the observations made by my brother Day and myself during the argument is that our view differs from that taken by Wright, J., at chambers.

Appeal allowed.

Solicitors for plaintiff: *Wontner & Sons.*
Solicitor for defendant: *Fereday.*

W. J. B.

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Jan. 11.

[IN THE COURT OF APPEAL.]

BANKS *v.* HOLLINGSWORTH AND ANOTHER.

Mayor's Court—Practice—Certiorari—Removal of Action—Borough and Local Courts of Record Act, 1872 (35 & 36 *Vict. c.* 86), *Sched. clause* 12.

By clause 12 of the schedule to the Borough and Local Courts of Record Act, 1872 (which was applied to the Mayor's Court by Order in Council): "No action entered in the Court shall before judgment be removed or removeable from the Court into any superior Court by any writ or process, except by leave of a judge of one of the superior Courts in cases which shall appear to such judge fit to be tried in one of the superior Courts . . . .":—

Held, that the clause imposed a limitation on the previous right of a defendant to have an action removed into the superior Court under the Mayor's Court Act, 1857 (20 & 21 Vict. c. clvii.), and gave power to the judge in the exercise of his discretion to order the removal of any such action, but subject to the condition precedent that the judge should first be satisfied that the action was fit to be tried in the superior Court.

The expression "case fit to be tried in the superior Courts" must be taken to mean a case which "ought" to be tried there, or which is "more fit" to be tried there than in an inferior Court.

APPEAL of the defendants from a decision of a Divisional Court (Pollock, B., and Charles, J.) affirming the refusal of Mathew, J., and of a master at chambers to grant a writ of certiorari for the

removal of the action from the Mayor's Court into the High Court. (1)

The action had been brought in the Mayor's Court to recover the sum of 35*l.*, the declaration alleging that the defendants purported to carry on business as stock and share dealers, and that in order to induce the plaintiff to deposit certain sums of money with them they falsely and fraudulently represented to him that they had formed and opened syndicates for operating in certain stocks and shares, and the plaintiff, believing the representations, had deposited 35*l.* with them. The alleged misrepresentations were contained in a circular issued by the defendants, in which they invited the public to subscribe to syndicates formed or to be formed by them, and this was one of three actions arising out of the same circular, which had been brought in the Mayor's Court by different plaintiffs, one of which had already been removed into the High Court by writ of certiorari granted at chambers. It was stated by the defendants that many persons besides the plaintiff had subscribed to the syndicate, and might also sue the defendants for a return of their money in the event of the plaintiff succeeding in this action.

E. Morten, (*Cock, Q.C.*, with him), for the defendants. Under clause 12 of the schedule to 35 & 36 Vict. c. 86, a defendant has a right to have the action removed into the superior Court, if it is a fit case to be tried there; it is immaterial that the amount sought to be recovered is less than 50*l.*, for the legislature has drawn no distinction founded on the sum claimed in the action. Before 1872, the statutory enactment as to removal of actions

(1) By s. 2 of the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), power is given to Her Majesty by an Order in Council to direct that the provisions in the schedule to the Act shall apply to all or any local Court or Courts of record in England or Wales.

Clause 12 of the schedule provides that, "No action entered in the Court shall before judgment be removed or removeable from the Court into any superior Court by any writ or process, except by leave of a judge of one of the superior Courts in cases which shall appear to such judge fit to be tried in one of the superior Courts, and upon such terms, as to payment of costs, security for debt and costs, or such other terms, as such judge shall think fit."

By Order in Council, dated June 26, 1873, clause 12 of the schedule is applied to the Mayor's Court.

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brought to recover a sum not exceeding 50*l.* from the Mayor's Court was contained in s. 16 of the Mayor's Court Act, 1857 (20 & 21 Vict. c. clvii.), under which the defendant had a right to remove such an action before judgment, upon entering into recognizances as therein provided. Clause 12 of the schedule to the Local Courts Act of 1872 limits that absolute right, but limits it only to this extent, that the case must appear to a judge of the superior Court fit to be tried in that Court; that condition once performed, the defendant is entitled as a matter of right to have the action removed by certiorari.

[LORD ESHER, M.R. Suppose the judge thinks the case equally fit for either Court, has he a discretion as to its removal?]

No; he is bound to order it to be removed; the provision of clause 12 is in limitation of an existing right, and must be strictly construed. In *Simpson* v. *Shaw* (1), which was an action against a stockbroker founded on alleged misrepresentations, it was held that the case was fit to be tried in the superior Court, and that the defendant was therefore entitled to a writ of certiorari to remove it from the Mayor's Court. That decision conclusively shews that a defendant has a right to have his case removed if it is fit to be tried in the superior Court, or, at any rate, if it seems to a judge to be so. The present case is stronger than *Simpson* v. *Shaw* (1), for it is not an isolated charge of fraud, but a charge of conducting a business in a fraudulent manner, and it is important to the defendants that such a charge should be tried before the best and most impartial tribunal. It would be to the advantage of all parties if this action were removed, as it could be consolidated with the action already removed into the High Court, and then the necessity would be obviated of the same question being litigated both in the High Court and the Mayor's Court. [He also cited *Cherry* v. *Endean* (2); *Bennett* v. *Lord Bury* (3); *Amos* v. *Chadwick* (4); *Amos* v. *Chadwick.* (5)]

Reid, Q.C. (*L. E. Glyn,* with him), for the plaintiff. Clause 12 amounts to a limitation on the previous right of the defendant

(1) 56 L. J. (Q.B.) 92.
(2) 55 L. J. (Q.B.) 292.
(3) 5 C. P. D. 339.
(4) 4 Ch. D. 869.
(5) 9 Ch. D. 459.

to remove the action; the question whether the action shall be removed is now left to the discretion of the judge to whom the application is made. This is the effect of the decision in *Cherry* v. *Endean*. (1) The expression "fit" to be tried in the superior Court must mean adapted rather for the superior than the inferior Court. The two main guides for the judge in the exercise of his discretion in such a case would be the amount claimed, and the existence of some special difficulty in the case; but the amount is here primâ facie fit for the inferior Court, and no special difficulty has been suggested. The master, the judge, and the Divisional Court, have all concurred in holding that the plaintiff ought to be allowed to exercise his common law right of suing in whichever Court he thinks fit, and this Court will not interfere with a discretion so exercised.

E. Morten, in reply. The language in clause 12 is not "more fit" but "fit," and it only operates to take away the right of removal in cases where the action is one with which the time of the High Court ought not to be taken up.

LORD ESHER, M.R. I am of opinion that this appeal must be dismissed. The plaintiff brought an action against the defendants in the Mayor's Court, founded on the allegation that they had put forward a circular containing misrepresentations, that they had done this fraudulently, and that the plaintiff had been misled by the fraudulent misrepresentations to part with his money. The defendants took out a summons to remove the action into the High Court. In support of this application it is said, first, that although the action is only brought to recover less than fifty pounds, the plaintiff makes a charge of fraud—a charge which is material to the position of the defendants as men in business, and may have a grave effect upon their power of carrying on that business, and that the action is one, therefore, which ought to be tried in the High Court, whatever may be the amount claimed. The argument, indeed, goes so far as to suggest that the defendants have a right to insist upon a trial in the High Court, and to have the action removed from the Mayor's Court for that purpose. It is also urged, that even if

(1) 55 L. J. (Q.B.) 292.

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this one charge of fraud be insufficient to justify the removal, yet other persons are making charges against the defendants of fraudulent misrepresentations contained in the same circular, and one of them has brought a similar action which has been removed into the High Court; that if this action were also removed, the claims could be consolidated, with the result that there would be only one trial; whereas if this action were not removed there might be one trial in the Mayor's Court and one in the High Court in respect of the same alleged fraud; the argument goes even to the length of contending that the judge is bound to remove it.

The answer to this contention depends upon the true construction of clause 12 of the schedule to the Act of 1872, which has been made applicable by Order in Council to the Mayor's Court. We must construe it according to the ordinary grammatical rules of construction, and the first observation is that the clause is drawn in a negative form; it is not an affirmative enactment saying how the judge is to act, but a negative enactment to the effect that a certain thing shall not be done unless certain other things happen; to interpret it we must, therefore, look to see what was the law under the statute previously in force. Looking at the Mayor's Court Act, 1857, it is said that under s. 16, in such a case as the present, even if this were the only action against the defendants, they would have a right to have it removed, and this contention may perhaps be well founded; but it is obvious that clause 12 of the schedule to the Act of 1872 imposes a limitation on the right which a defendant possessed previously. It is said on behalf of the defendants that it is only a partial limitation; while the other side contend that it is a limitation which takes away the absolute right of a defendant to a removal of the action under any circumstances, and gives him only a right to submit the question to the discretion of a judge of the High Court. If we read clause 12 down to the words "except by leave," and stop there, it is obvious that the defendant's absolute right has been taken away, and the removal is made conditional on the leave of a judge of the superior Court. Then the clause proceeds, "in cases which shall appear to such judge fit to be tried in one of the superior Courts." Therefore

the right of a defendant is now limited to this, that he cannot remove the action from the Mayor's Court to the High Court unless it appears to a judge of the High Court that the case is fit to be tried in that Court, and the leave of a judge must be obtained. The clause gives a judge power to remove an action. But what is the nature of that power? Is it a power which he must exercise as a matter of law? Or is it a discretionary power to be exercised only having regard to the particular circumstances of each case? If the latter is the nature of the power, the judge must obviously have a discretion to determine whether the action is one which is fit to be removed. It must, however, be noticed that the language of the clause is not which *is* fit, but which *shall appear* fit to be removed, thus imposing upon the judge the duty of determining whether in his view the action is one which is fit for removal. Now, what is the meaning of "fit to be tried in the superior Court"? It cannot mean "able" to be tried in that Court, for that would involve a question of jurisdiction, which is obviously not the meaning; it must mean where it appears to a judge that the action is one which "ought" to be tried in a superior Court. If an action has been brought in the inferior Court, it is not to be removed unless it appears to the judge that it ought to be tried in the superior Court. It is obvious that an action like the present can be tried in the High Court; actions to recover less than fifty pounds are frequently brought and tried there; and it is not for us or for the judge to determine in which Court it ought to be brought. Under what circumstances should it be removed?

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The question upon an application of this nature is whether, considering all the circumstances of the case and the interests of the parties and of public justice, the case ought to be tried in the High Court rather than in that in which the action was brought, and the judge who has to determine the question of removal must consider all the circumstances. He must consider the amount of the claim; it may be important if the amount claimed is very small, yet, if the case involves questions of a complex or highly difficult nature requiring the knowledge and experience of the judges of the superior Court for their determination, the judge may well be of opinion that it should be tried

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in the superior Court. There are many other circumstances which would properly influence his decision as to the propriety of removal, such, for instance, as the Court in which justice will in the particular case be more speedily arrived at; for it might happen that in the superior Court a case involving some difficulty could not be reached for some months, yet the inferior Court might be perfectly able to try it, and to try it at once. I do not say that, upon any one of such points as I have suggested being clearly made out, a judge would be obliged to take either the one course or the other as regards the removal of the action; all that the clause means, in my opinion, is that the judge must say, after a reasonable, judicial, and careful consideration of the circumstances, whether an action ought rather to be tried in the High Court or in the Court in which it was brought; if he thinks it ought, he will grant the writ of certiorari for its removal; if he thinks it ought not, it will remain in the inferior Court; his conclusion may depend on many considerations, and must be a matter of discretion.

The question has been raised before us whether the judge ought to consider the fact that other plaintiffs have brought other actions upon the same alleged fraud, and I have some doubt whether he ought to do so; but if he is at liberty to do it, it is only one of the circumstances which he has to consider, and we should not interfere with the discretion which he might exercise in arriving at his conclusion. I am of opinion, therefore, that the decision of the learned judge was a decision on circumstances which were well within his discretion to consider, and an appeal will only lie for a wrongful exercise of discretion. That is not the case here, for I think the learned judge was clearly right in the way he exercised it. The appeal must therefore be dismissed.

BOWEN, L.J. I am of the same opinion. This is clearly not a case in which, if the judge has a discretion, the Court would dream of overruling his exercise of it, for it would be impossible to shew that it has been exercised upon a wrong principle. The real question is whether such a discretion exists, and this depends upon the true construction of clause 12 of the schedule

to the Act of 1872. To see whether the judge had that discretion we must place a meaning on the words "fit to be tried in one of the superior Courts." Is there anything in the context to shew what that meaning should be? In the first place, it is to be observed that the right to move an action into the superior Court has been taken away except in cases where the leave of a judge is obtained. Secondly, the view which the judge takes of the circumstances is the condition precedent to his granting leave. The whole question depends on his view, not on the fitness of the case for removal, but on its *appearing* to him to be fit. The language tends to shew that "fitness to be tried" means a fitness in the opinion of the judge, and not a fitness as a matter of strict law. If that be so, it follows that the clause as a whole leaves the judge free to form his opinion as an opinion, and to exercise his discretion as a discretion. This therefore was, in my opinion, a matter for the discretion of the judge; and, for the reasons given by the Master of the Rolls, I agree that it is impossible for us to interfere. I also agree that, as far as I can see, the discretion was soundly exercised.

A. L. SMITH, L.J. I am of the same opinion. In *Cherry* v. *Endean* (1) the point was that, notwithstanding the provisions of clause 12, the defendant had a common law right to move the action into the superior Court, no matter what might be the nature of the cause, the amount claimed, or the circumstances of the case. All we there held was that the right was fettered to this extent, that the certiorari would not go unless the leave of a judge were obtained. Now comes the present case, in which it is argued that if the cause was a fit cause to be removed the judge had no discretion as to allowing its removal; and this depends, as has been pointed out, on the meaning of the words "fit to be tried in the superior Court." I can suggest no more apt illustration of that meaning than the suggestion of the Master of the Rolls, that it means "which ought to be tried in the superior Court," or "which is more fit to be tried" there. If that be so, it is obvious that the judge had a discretion as to the removal. Every Court before which this matter has been

(1) 55 L. J. (Q.B.) 292.

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has held that the case ought to be tried in the inferior Court, and we cannot interfere with the exercise of their discretion, which, in my opinion, was rightly exercised.

Appeal dismissed.

Solicitors for plaintiff: *W. H. Smith & Sons.*
Solicitor for defendant: *C. G. Algar.*

W. J. B.

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Feb. 4.

[CROWN CASE RESERVED.]

THE QUEEN *v.* INSTAN.

Criminal Law—Offences against the Person—Manslaughter—Neglect to provide Food or Medical Attendance for Person of Full Age.

The prisoner, a woman of full age and without any means of her own, lived with and was maintained by the deceased, her aunt, a woman of seventy-three. No one lived with them. For the last ten days of her life the deceased suffered from a disease which prevented her from moving or doing anything to procure assistance; during this time the prisoner lived in the house and took in the food supplied by the tradesmen, but apparently gave none of it to the deceased, nor did she procure for her any medical or nursing attendance, or inform any one of the condition of the deceased, although she had abundant opportunity to do so. No one but the prisoner had any knowledge of the condition of the deceased prior to her death, which was substantially accelerated by want of food, nursing, and medical attendance:—

Held, that a duty was imposed upon the prisoner under the circumstances to supply the deceased with sufficient food to maintain life, and that, the death of the deceased having been accelerated by the neglect of such duty, the prisoner was properly convicted of manslaughter.

CASE stated by Day, J.

Kate Instan was tried before me at the last assizes for the county of Worcester upon a charge of feloniously killing one Ann Hunt. The prisoner, who is between thirty and forty years of age and unmarried, had no occupation and no means of her own of living. She was a niece of the deceased.

At the time of the committal of the alleged offence, and for some time previous thereto, she had been living with and had been maintained by the deceased. Deceased was a woman of some seventy-three years of age, and until a few weeks before her death was healthy and able to take care of herself. She was

possessed of a small life income, and had in the house in which she lived some little furniture, and a few other articles of trifling value. The two women lived together in a house taken by the deceased; no one lived with them or in any way attended to them.

The deceased shortly before her death suffered from gangrene in the leg, which rendered her during the last ten days of her life quite unable to attend to herself or to move about or to do anything to procure assistance. No one but the prisoner had previous to the death any knowledge of the condition in which her aunt thus was. The prisoner continued to live in the house at the cost of the deceased, and took in the food supplied by the tradespeople; but does not appear to have given any to the deceased, and she certainly did not give or procure any medical or nursing attendance to or for her, or give notice to any neighbour of her condition or wants, although she had abundant opportunity and occasion to do so.

The body of the deceased was on August 2, while the prisoner was still living in the house, found much decomposed, partially dressed in her day clothes, and lying partly on the ground and partly prone upon the bed. The death probably occurred from four to seven days before August 3, the date of the post-mortem examination of the body. The cause of death was exhaustion caused by the gangrene, but substantially accelerated by neglect, want of food, of nursing, and of medical attendance during several days previous to the death. All these wants could and would have been supplied if any notice of the condition of the deceased had been given by the prisoner to any of the neighbours, of whom there were several living in adjoining houses, or to the relations of the deceased, who lived within a few miles. It was proved that the prisoner, while the deceased must have been just about dying, had conversations with neighbours about the deceased, but did not avail herself of the opportunities thus afforded of disclosing the condition in which she then was.

At the close of the case it was objected on behalf of the prisoner, that there was no evidence of any legal duty such as would bind the prisoner to give or to procure any food, or nursing, or attendance to or for the deceased, or to give any notice to any

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one that such was required. I thought it better not to stop the case, but to leave it to the jury to say whether, having regard to the circumstances under which the prisoner lived with the deceased, and continued to occupy the house, and to take the food provided at the expense of the deceased, while the deceased was, as she knew, unable to communicate with any other person and thus to procure necessaries for herself, the prisoner did or did not impliedly undertake with the deceased either to wait upon and attend to her herself, or to communicate to persons outside the house the knowledge of her helpless condition; and I told them that if they came to the conclusion that she did so undertake, and that the death of the deceased was substantially accelerated by her failure to carry out such undertaking, they might find the prisoner guilty of manslaughter, but that otherwise they should acquit her. The jury found the prisoner guilty.

If the facts above stated do not afford evidence of the existence of any such undertaking or duty, then the conviction is to be quashed; if otherwise, it is to stand.

Vachell, for the prisoner. There was no legal duty imposed upon the prisoner to provide food or attendance for the deceased during the last ten days of her life; there was certainly no such duty before that time, for the deceased was the head of the household and able to help herself. Such a duty as is here sought to be enforced can only arise by virtue of a statute or a contract, or at common law. It must be conceded that there was no statutory duty, neither was there any duty at common law; there is no authority for the existence of any such common law duty in the case of a person of full age; in such a case the duty can only arise in respect of an undertaking, express or implied. In *Rex* v. *Friend* (1), it was held to be an indictable offence to refuse or neglect to provide sufficient food, bedding, &c., to an infant of tender years, unable to provide for and take care of itself, whom a man was obliged by duty or contract to provide for; but the decision was in terms confined to such cases, and the indictment was held to be defective in not stating the child to be of tender years and unable to provide for itself. In *Reg.* v.

(1) R. & R. 20.

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Shepherd (1), it was held that there was no duty upon a woman to procure a midwife for her daughter, a girl of eighteen, and that she could not be convicted of manslaughter for omitting to do so. In his judgment, Erle, C.J., says: "Here the girl was beyond the age of childhood, and was entirely emancipated." In the case of a person of full age such a duty may indeed arise out of an express or implied undertaking: *Reg.* v. *Marriott* (2), where a man was convicted of the manslaughter of an elderly and infirm woman, whom he had taken home to live in his house, promising to make her happy and comfortable. In summing up in that case, Patteson, J., said: "The cases which have happened of this description have been generally cases of children and servants, where the duty was apparent. This is not such a case; but it will be for you to say whether, from the way in which the prisoner treated her, he had not by way of contract, in some way or other, taken upon him the performance of that duty which she, from age and infirmity, was incapable of doing." In the present case there was no evidence of any contract or undertaking by the prisoner to take care of her aunt, though no doubt she was under a moral obligation to do so.

[HAWKINS, J. Why should not a contract be implied from such circumstances as those in this case? Suppose two people agreed to live together for their mutual benefit, would not the mere fact of their living together be evidence from which an undertaking might be implied?]

[CAVE, J. When the prisoner took in food paid for with the deceased's money, she had no right to apply it all for her own use. Did she not then undertake a duty towards the deceased?]

Not by way of contract so as to raise a legal duty; it was nothing more than a duty of imperfect obligation.

LORD COLERIDGE, C.J. We are all of opinion that this conviction must be affirmed. It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement. There can be no

(1) L. & C. 147. (2) 8 C. & P. 425.

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question in this case that it was the clear duty of the prisoner to impart to the deceased so much as was necessary to sustain life of the food which she from time to time took in, and which was paid for by the deceased's own money for the purpose of the maintenance of herself and the prisoner; it was only through the instrumentality of the prisoner that the deceased could get the food. There was, therefore, a common law duty imposed upon the prisoner which she did not discharge.

Nor can there be any question that the failure of the prisoner to discharge her legal duty at least accelerated the death of the deceased, if it did not actually cause it. There is no case directly in point; but it would be a slur upon and a discredit to the administration of justice in this country if there were any doubt as to the legal principle, or as to the present case being within it. The prisoner was under a moral obligation to the deceased from which arose a legal duty towards her; that legal duty the prisoner has wilfully and deliberately left unperformed, with the consequence that there has been an acceleration of the death of the deceased owing to the non-performance of that legal duty. It is unnecessary to say more than that upon the evidence this conviction was most properly arrived at.

HAWKINS, CAVE, DAY, and COLLINS, JJ., concurred.

Conviction affirmed.

Solicitors for the prisoner: *Ivens & Morton, Kidderminster.*

W. J. B.

[IN THE COURT OF APPEAL.]

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Jan. 20.

IN RE POLLITT. EX PARTE MINOR.

Bankruptcy—Property of Bankrupt—Relation of Trustee's Title—Money handed by Debtor to Solicitor to answer future Costs—Claim to retain for Services rendered after Act of Bankruptcy—Mutual Dealings—Set-off—Claim to set off Debt for Past Services against Claim of Trustee—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *ss.* 38, 43, 44.

A debtor consulted a solicitor to whom he was then indebted for costs. The solicitor declined to act further unless he were furnished with money to meet future costs, and the debtor placed money in his hands for that purpose. The solicitor then called the debtor's creditors together, and prepared a deed of assignment, which the debtor executed. The debtor was afterwards adjudged bankrupt, the act of bankruptcy being the execution of the deed of assignment.

On an application for payment to the trustee in bankruptcy of the money in the hands of the solicitor :—

Held, by the Court of Appeal, affirming the decision of the Queen's Bench Division, that the solicitor was not entitled to retain the money as payment for services rendered by him to the debtor after the execution of the deed of assignment:

Held, also, that there had not been mutual dealings between the debtor and the solicitor within the meaning of s. 38 of the Bankruptcy Act, 1883, and, therefore, the solicitor could not set off against the claim of the trustee a debt due to him from the debtor for professional services rendered before the money was placed in his hands.

In re Sinclair, Ex parte Payne (15 Q. B. D. 616) distinguished.

APPEAL from a decision of the Queen's Bench Division. (1)

The order appealed from affirmed an order of the county court at Manchester, which had directed the appellant, Mr. Minor, a solicitor, to pay over to the official receiver, acting as trustee in the bankruptcy, a sum of 12*l.* 3*s.* 4*d.*, which was in the possession of the appellant under the following circumstances :—

The appellant had acted as solicitor for the debtor, and in December, 1891, about 40*l.* was due from the debtor to the appellant for costs in respect of professional services previously rendered.

On December 11, the debtor, being in difficulties, called upon the appellant to consult him as to his affairs. The appellant

(1) Ante, p. 175.

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declined to act for the debtor unless he were furnished with money to meet future costs. The debtor thereupon obtained a sum of 15*l.*, which he handed over to the appellant to secure any costs which might be incurred. The appellant then acted for the debtor, caused his creditors to be called together, and prepared a deed of assignment, which the debtor executed on December 12. On January 2, 1892, the debtor was adjudged a bankrupt, the act of bankruptcy alleged in the petition being the execution of the deed of assignment of December 12. The sum now in dispute, 12*l.* 3*s.* 4*d.*, was that portion of the above-mentioned sum of 15*l.* which the appellant claimed to be entitled to retain in respect of professional services rendered to the debtor after the execution of the deed of assignment. The remainder of the 15*l.* was applied to the payment of costs in respect of services rendered before the execution of the deed.

The solicitor, by leave of the Divisional Court, appealed to the Court of Appeal.

Herbert Reed, Q.C., and *Shearman*, for the appellant, repeated the arguments which they had adduced in the Divisional Court, citing on the first point: *In re Sinclair, Ex parte Payne* (1); *In re Spackman, Ex parte Foley* (2); *Cohen* v. *Mitchell* (3); and, on the question of set-off, *Hill* v. *Smith* (4); *Stumore* v. *Campbell* (5); Bullen and Leake's Pleadings (3rd. ed.), at p. 679.

Sir Charles Russell, A.G., and *Muir Mackenzie*, for the official receiver, were not called upon.

LORD ESHER, M.R. In my opinion this appeal must be dismissed.

The debtor, before he had committed an act of bankruptcy, consulted a solicitor, and requested him to do professional work for him. The solicitor had acted for him before, and was entitled to be paid for the work which he had done; but he had not been paid. When the debtor asked him to undertake more work for

(1) 15 Q. B. D. 616.
(2) 24 Q. B. D. 728.
(3) 25 Q. B. D. 262.
(4) 12 M. & W. 618.
(5) [1892] 1 Q. B. 314.

him, the solicitor said, "I cannot work for you any more on credit. I must be paid beforehand. You must give me a sum of money sufficient to cover the costs of any work which I may undertake for you." The debtor thereupon gave him 15*l.* That money was given him for a specific purpose, viz., that out of it the solicitor might retain his costs in relation to the work which he might do for the debtor. The money was given to him for that purpose, and for that purpose only. Then he prepared a deed of assignment for the benefit of the debtor's creditors, and did some other work. This work was done at a time when the solicitor was entitled to do it for the debtor, and to charge him for it. For that work the solicitor has been paid. He had a right to retain in respect of it a portion of the 15*l.*, and in that way he has been paid. There remained in his hands the residue of the 15*l.* Then the deed of assignment which had been prepared by the solicitor was executed by the debtor; its execution was an act of bankruptcy, and the solicitor knew that it was. The title of the trustee in the subsequent bankruptcy related back to that act of bankruptcy. What does that mean? The result of the relation back is, that all subsequent dealings with the debtor's property must be treated as if the bankruptcy had taken place at the moment when the act of bankruptcy was committed. The debtor must be considered as having become a bankrupt the moment the deed was executed. Then, he being a bankrupt, all the money which he then had, and all the money which was owing to him, passed to the trustee in the bankruptcy for the purpose of being distributed by him amongst the bankrupt's creditors. Part of that work, for which the 15*l.* had been given to the solicitor in order that he might pay himself out of it, had not then been done. At that very moment, the solicitor could not do any work for the bankrupt so as to take away from the trustee the money which was then due to the bankrupt, for the act of bankruptcy put an end to the solicitor's authority to do work for the bankrupt as against the money which he then had in hand. If the authority to do the work is revoked, what is the result, when money has been paid to the person to whom the authority was given for the specific purpose? If he is prevented from carrying out that specific purpose by law, or by the order of the person

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who was legally entitled to prevent him from doing so, he must pay back the money. When money is paid for a specific purpose, and that purpose is not carried out, the money must be paid back. The solicitor, therefore, was bound to pay this money to the trustee in the bankruptcy. That being so, the trustee is entitled to keep the money, unless some other ground can be shewn for depriving him of it. It is said that the money which was expended after the act of bankruptcy was expended in paying for services necessarily rendered by the solicitor in assisting the debtor to avoid bankruptcy. But he was then a bankrupt; that is, he must be treated as if he had then already become a bankrupt. Anything which the solicitor did after that, knowing of the act of bankruptcy, cannot be said to have been done to enable the debtor to avoid bankruptcy. The solicitor, therefore, who acted with knowledge of the act of bankruptcy, ran the risk of losing his costs. If what he did is adopted by the trustee in the bankruptcy, then he must be paid in the bankruptcy; if it is not adopted by the trustee, the solicitor cannot compel the trustee to pay for doing that which it was his duty either to do himself or to get some one else to do for him. The present case cannot be brought within *In re Sinclair* (1), and I agree that *In re Sinclair* (1) must not be extended beyond the payment of that which is necessary for the debtor on the ground, if I may say so, of humanity.

Then comes the question, whether the solicitor is entitled to set off this sum against the 40*l.* due to him from the bankrupt, or to treat the two amounts as "mutual credits." There is this difficulty. If the money was given to the solicitor for a specific purpose, then, as between him and the bankrupt, there could not be a set-off; nor as between them could there be any mutual credit. And, as regards the trustee in the bankruptcy, there is this difficulty, that the original credit was between the bankrupt and the solicitor, and the new credit is between the trustee and the solicitor. In other words, the two credits are between different parties, and therefore they are not mutual. In my opinion, the judgment of the Divisional Court was right.

(1) 15 Q. B. D. 616.

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LINDLEY, L.J. This is no doubt a hard case on the appellant; but we are not at liberty on that ground to prefer him to the other creditors. I agree with the judgment of the Master of the Rolls.

A. L. SMITH, L.J. I also agree, and I have nothing to add.

Appeal dismissed.

Solicitors: *Nicholson & Crouch, for Minor, Manchester; Solicitor to Board of Trade.*

W. L. C.

[IN THE COURT OF APPEAL.]

C. A. 1893 *Feb.* 6.

COBB *v.* GREAT WESTERN RAILWAY COMPANY.

Railway Company—Negligence—Robbery of Passenger—Refusal to Detain Train—Overcrowding of Carriage—Damages, remoteness of.

A statement of claim stated, in substance, that the plaintiff, while a passenger in one of the defendants' trains, which was then stopping at a railway station, was robbed by a gang of men who entered the carriage in which he was seated; that there was a force of police at the station at the time; that the plaintiff complained to the station-master of the robbery, but he refused to detain the train to permit the plaintiff to give the said men into custody, and have them searched; that, upon the plaintiff's complaint being made to him, the station-master gave the signal to start the train, which was accordingly started; that the plaintiff was thereby prevented from having the said men searched and his property recovered; and that the stolen property was in the carriage when the plaintiff complained to the station-master, and might and would have been recovered, if he had afforded time for the necessary search:—

Held, that the statement of claim disclosed no cause of action.

A passenger claimed to recover as damages from a railway company a sum of money, of which he had been robbed, in consequence, as he alleged, of the company's negligence in allowing their carriage to be overcrowded:—

Held, that the damage claimed for was too remote.

APPEAL of plaintiff from judgment of a Divisional Court (Day and Collins, JJ.) on a point of law raised by the pleadings, which had been ordered to be disposed of before the trial under Order XXV., r. 2.

The point of law was in substance whether the statement of claim disclosed any cause of action.

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The statement of claim was as follows:—

1. On May 6, 1892, the plaintiff was received by the defendant company as a passenger, to be carried on defendant company's railway by the 8.15 P.M. passenger train from Shrewsbury to Birmingham, for reward to the defendant company then paid by the plaintiff.

2. The said train, in the course of its journey, stopped at Wellington, and the plaintiff was there, while in the defendant company's railway carriage on the journey aforesaid, robbed by a gang of men, who there entered the said carriage, of the sum of 89*l.* 1*s.*, consisting of gold and silver and notes, which the plaintiff was then carrying in his pocket. The said gang of men numbered about sixteen.

3. The plaintiff forthwith complained of having been robbed as aforesaid to the defendant company's station-master; but the said station-master refused to detain the train to permit the plaintiff to give the said men into custody and have them searched.

4. It is the duty of the said station-master, as the defendant company's servant, to give the signal for the said train to be started; and, immediately upon plaintiff's complaint being made to him, he negligently and improperly, and in breach of the duty owed by the defendant company to the plaintiff, as a passenger on their line, to protect him in person and property, and to oppose no obstacle to his recovering the property, whereof he had while on their line been wrongfully deprived, gave the signal for the said train to leave, and it left accordingly; and the plaintiff was thereby prevented, without any negligence on his part, from having the said men searched and his aforesaid property recovered. There was in and about the said station at the time of the robbery, as the said station-master well knew, a large force of police ready and willing to effect the said arrest for the plaintiff, and to search those arrested, but they were prevented from doing so by the action of the defendant company's servant in immediately starting the said train. The said 89*l.* 1*s.* was still in the aforesaid compartment of the carriage at the time when the plaintiff complained to the said station-master, and might and would then have been recovered, had he afforded time for the necessary search.

5. The defendant company was negligent in permitting the said carriage to be overcrowded, and so facilitating the hustling and robbing of the plaintiff. The said compartment of the carriage plaintiff was in was constructed to carry ten passengers, and the defendant company caused or permitted the said gang of sixteen men to enter it, after plaintiff was already seated in the said compartment.

6. The plaintiff has since prosecuted to conviction two of the aforesaid gang of sixteen men who robbed him (being all that have as yet been identified).

7. The plaintiff has by reason of the aforesaid negligence of the defendant company wholly lost the said 89*l.* 1*s.*

The plaintiff claims 89*l.* 1*s.* as damages for the matters hereinbefore complained of.

The Divisional Court held that the statement of claim disclosed no cause of action.

R. W. Harper, for the plaintiff. It is the duty of a railway company towards a passenger to use due care for the safety of his person, and of the property which he has about him. Upon the statement of claim it appears that the defendants refused and neglected to give reasonable facilities for the recovery of the plaintiff's property which had been stolen while he was in their carriage. It was the duty of the defendants to give the plaintiff reasonable opportunity of having the carriage and the thieves searched and recovering his property. [He cited on this point the judgment of Chalmers, J., in *New Orleans, St. Louis, and Chicago Ry. Co.* v. *Burke.* (1)]

[LORD ESHER, M.R. The facts in that case were altogether different. There the question was as to the duty of the company to protect a passenger who was being assaulted by fellow-passengers. There was no question in the present case of interfering at the time to prevent violence or robbery. The robbery was over, and the question is as to the existence of a subsequent duty to give facilities for arresting or searching the thieves.

BOWEN, L.J. It is not specifically alleged in the statement of claim that the plaintiff ever told the station-master that he desired

(1) 24 American Reports, 689.

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to give anybody in charge or to have anybody searched. His complaint in reality seems to be that the station-master did not delay the train to give him an opportunity of seeing what course he would take.]

By starting the train the station-master facilitated the escape of the thieves with the stolen property.

Secondly, it was negligence on the part of the defendants to allow the carriage to be overcrowded; and the statement of claim alleges, and, on this argument, it must be taken to be the fact, that the result of such negligence was that the plaintiff was robbed of his property. [He cited on this point *Great Western Ry. Co.* v. *Bunch* (1); *Bergheim* v. *Great Eastern Ry. Co.* (2)]

Lyttelton, for the defendants, was not called upon to argue.

LORD ESHER, M.R. I think that the judgment in this case must be affirmed on the ground that the statement of claim shews no liability on the part of the defendants under either of the heads relied upon for the plaintiff. So far as the first head is concerned the statement of claim comes substantially to this: The plaintiff was a passenger on the defendants' railway, and, whilst he was in one of their carriages at a railway station, he was robbed. He complained of having been robbed to the station-master. There happened to be a body of police at the station at the time. The plaintiff was desirous that the train should be detained in order that the persons who had robbed him, or those whom he supposed to have robbed him, might be searched. He requested the station-master to detain the train, and it is alleged that it was the duty of the station-master, upon such request being made to him, to detain the train, which he refused to do. Under what head of law can such a duty be alleged? The defendants' undertaking is to carry the passenger from one place to another, and that, whilst he is being so carried, they will use due care to carry him safely. They have carried him, and, so far as he personally is concerned, they have carried him safely in accordance with that undertaking. So far as this part of the case is concerned, it must be taken that the robbery was not due to any negligence of the defendants; it is not alleged

(1) 13 App. Cas. 31. (2) 3 C. P. D. 221.

that the plaintiff was being ill-used or assaulted in the train, and that, that fact being made known to the defendants' servants, they did not interfere to protect him. That would be a different case. Whatever was done to him was done and over; the robbery was finished when he complained to the station-master. The station-master was not, so far as appears from the statement of claim, asked to have the carriage or the men in it searched. What, upon the facts as stated, I should infer the plaintiff really wanted was that the train and the other passengers in it should be detained whilst the complaint of the plaintiff was being inquired into by the police. Was this part of the obligation imposed upon the company by their contract to carry the plaintiff safely? It seems to me to have nothing to do with that contract, and to be wholly outside of it. I do not think that, on the facts as stated, it is shewn that there was any obligation imposed on the station-master, as the servant of the company, to detain the train. If there was no obligation imposed on the company which they have broken or negligently performed, then it follows that there is no cause of action. Therefore, so far, I think that the plaintiff has no cause of action.

With regard to the second head of complaint, there was, according to the statement of claim, a breach of duty. It was the duty of the defendants not to allow their carriage to be overcrowded. But then it is necessary to shew that the alleged damage was such as would naturally and ordinarily result from such breach of duty. It cannot be considered as the probable and ordinary result of allowing a compartment of a railway carriage to be overcrowded that a passenger should be robbed by his fellow-passengers. The damage alleged is too remote. Therefore, upon the facts, as alleged by the statement of claim, I think that no cause of action is shewn. For these reasons I am of opinion that the appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. Two points have been discussed in the argument, which however did not follow the chronological order of events. The first point discussed was whether what is alleged to have happened after the robbery shews any breach of duty on the part of the defendants. This

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part of the statement of claim is drawn in somewhat vague terms, as is often the case where it is difficult on the facts to make out a sound cause of action; but we must really confine the plaintiff to some definite construction of the allegations made. The material allegations are those of paragraph 3 as elaborated by paragraph 4. These allegations appear to be that the station-master, after information of the robbery, refused to detain the train *to permit* the plaintiff to give the men who had robbed him into custody; and that he refused to detain the train, so that the plaintiff *might have an opportunity* of recovering his property, and of having the men searched; or, as the Master of the Rolls put it, the meaning may be that he was not allowed an opportunity of complaining to the police. There was no obligation imposed by the contract of carriage on the railway company to afford to the plaintiff such an opportunity. They were not bound to stop the train for such a purpose. There is nowhere any specific allegation that the plaintiff was hindered from giving the men who had robbed him into custody, or from recovering his property, by the direct action of the station-master, which would have been a different matter altogether.

The second point argued was this. It was said that the overcrowding of the carriage had caused damage to the plaintiff by occasioning the robbery. It seems to me impossible to treat the alleged damage as otherwise than too remote according to English law. The law is that the damages must be the direct and natural consequence of the breach of obligation complained of. The law is the same in this respect with regard both to contracts and to torts, subject to the qualification, that in the case of the former the law does not consider too remote damages which may be reasonably supposed to have been in the contemplation of the parties when the contract was made. It cannot fairly be said that the robbery was the natural consequence of overcrowding the railway carriage.

A. L. SMITH, L.J. I am of the same opinion. I do not wish to add anything on the first point argued, viz., whether there was any duty imposed on the railway company to detain the train in order to give the plaintiff facilities for searching those whom

he supposed to be the persons who had robbed him or for giving them into custody.

On the second point I wish to say this. It was held in the House of Lords in *Metropolitan Ry. Co.* v. *Jackson* (1), that overcrowding of carriages might be evidence of negligence on the part of the company, and therefore of a breach of duty by them. But, although that is so, I am still of opinion, as I was when the case of *Pounder* v. *North Eastern Ry. Co.* (2) was decided, that it is not the natural consequence of such negligence that a passenger should be assaulted by an independent tortfeasor, as in that case, or that he should have his pocket picked by a like tortfeasor, as in this. It seems to me that in both cases the damage is too remote.

Appeal dismissed.

Solicitors for plaintiff: *Steadman, Van Praagh, & Sons, for W. L. Wilmhurst, Huddersfield.*

Solicitor for defendants: *R. R. Nelson.*

E. L.

CLEARY *v.* BOOTH.

1893
Feb. 7.

Education Acts—Board School—Authority of Head Master—Punishment of Pupil for acts done on Way to School.

The authority delegated by the parent of a pupil to a schoolmaster to inflict reasonable personal chastisement upon him is not limited to offences committed by the pupil upon the premises of the school, but may extend to acts done by such pupil while on the way to and from school.

CASE stated by justices for Southampton, under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

The respondent had preferred an information against the appellant, charging him with an assault. From the evidence given before the justices, which was set out in the case, it appeared that the appellant was the head master of a board school, and the respondent was a pupil of that school. On the day in question the respondent was on his way to school in the morning, in company with another pupil named Callaway, when they met a third pupil named Godding. Callaway assaulted

(1) 3 App. Cas. 193. (2) [1892] 1 Q. B. 385.

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Godding; but there was no evidence before the magistrates that the respondent had also assaulted him, the appellant, owing to the course which the case took, having called no evidence. Upon complaint being made to the appellant of the assault he caned both Callaway and the respondent on the hand and back. Upon the respondent's mother complaining to the appellant of his having caned her son, he said that he did it because the respondent struck another boy. After the witnesses for the prosecution had been examined, the appellant's solicitor said that, before calling witnesses for the defence, he would take the opinion of the bench on the question of law whether the appellant was entitled to punish a pupil under such circumstances; the act for which the punishment was inflicted being done on the way to school, but outside, and at a considerable distance from, the school premises.

The justices were of opinion that the appellant was not entitled to punish a pupil for anything done by such pupil, although against another pupil, each being on their way to school, the act being committed off the school premises and unconnected with the school.

The appellant's solicitor then informed the bench that he would not call witnesses, but would ask for a case on the point of law; and the justices convicted the appellant, but agreed to state a case.

The questions for the opinion of the Court were—

(1.) Whether the appellant was justified, under the circumstances, in inflicting such punishment, and was, therefore, not liable to be convicted of a common assault.

(2.) Whether, if appellant was so justified, the punishment inflicted was not excessive.

Poland, Q.C. (*P. H. White*, and *H. Lynn*, with him), for the appellant. The power of a schoolmaster to punish a pupil is not limited to acts which take place within the four walls of the school premises. His authority over the pupil is an authority delegated by the parent; and though it would not extend to the conduct of a pupil while under his parent's roof, when the parental authority would be resumed, it must extend to the

conduct of the pupil on his way to and from school. One of the objects of education is to teach good manners, and this is recognised by the Education Department, which in s. 101 of its Code (1) authorizes a grant for discipline and organization, and orders that special regard is to be paid to the moral training and conduct of the children; this training would be obviously incomplete if the master had no control over the conduct of the children as soon as they were without the walls of the school. [He cited *Reg.* v. *Hopley* (2); *Fitzgerald* v. *Northcote* (3); *Hunter* v. *Johnson* (4).]

No one appeared to argue for the respondent.

LAWRANCE, J. The question in this case is not an easy one; there is no authority, and it is a case of first impression. The question for us is whether the head master of a board school is justified in inflicting corporal punishment upon one of his scholars for an act done outside the limits of the school, and the appellant's counsel has in his argument relied on what might happen if a boy were not punished by the master for such acts. The facts seem to be that a boy while coming to the appellant's school was assaulted by another boy belonging to the same school; that complaint was made to the appellant, who then and there punished the boy who had committed the assault and also the respondent, who was in his company. The first observation that occurs to one to make is that one of the greatest advantages of any punishment is that it should follow quickly on the offence. The cases cited to us shew that the schoolmaster is in the position of the parent. What is to become

(1) By s. 97 of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), an elementary school, in order to obtain a Parliamentary grant, must fulfil the conditions contained in the minutes of the Education Department in force for the time being.

By s. 101 of the Code of the Education Department (1892), a grant may be made for "discipline and organization," and the inspector is to have "special regard to the moral training and conduct of the children," while the managers and teachers are to satisfy him "that all reasonable care is taken, in the ordinary management of the school, to bring up the children in habits of punctuality, of good manners and language, of cleanliness and neatness, and also to impress upon the children the importance of cheerful obedience to duty, of consideration and respect for others, and of honour and truthfulness in word and act."

(2) 2 F. & F. 202.

(3) 4 F. & F. 656.

(4) 13 Q. B. D. 225.

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of a boy between his school and his home? Is he not under the authority of his parent or of the schoolmaster? It cannot be doubted that he is; and in my opinion among the powers delegated by the parent to the schoolmaster, such a power as was exercised by the appellant in this case would be freely delegated. If we turn to the Code we find that there are several things for which a grant may be given, including discipline and organization, and that the children are to be brought up in habits of good manners and language, and of consideration for others. Can it be reasonably argued that the only right of a schoolmaster to inflict punishment is in respect of acts done in the school, and that it is only while the boys are there that he is to see that they are well-mannered, but that he has exceeded all the authority delegated to him by the parent if he punishes a boy who within a yard of the school is guilty of gross misbehaviour? It is difficult to express in words the extent of the schoolmaster's authority in respect to the punishment of his pupils; but in my opinion his authority extends, not only to acts done in school, but also to cases where a complaint of acts done out of school, at any rate while going to and from school, is made to the schoolmaster. In the present case I think that weight may properly be placed on the fact that the act for which the boy was punished was done to another pupil of the same school. I think, therefore, that the justices were wrong in convicting the appellant as they did, and that the case must be sent back to them to find as a fact whether the punishment was excessive.

COLLINS, J. I am of the same opinion. It is clear law that a father has the right to inflict reasonable personal chastisement on his son. It is equally the law, and it is in accordance with very ancient practice, that he may delegate this right to the schoolmaster. Such a right has always commended itself to the common sense of mankind. It is clear that the relation of master and pupil carries with it the right of reasonable corporal chastisement. As a matter of common sense, how far is this power delegated by the parent to the schoolmaster? Is it limited to the time during which the boy is within the four walls of the school, or does it extend in any sense beyond that limit? In my opinion the purpose with which the parental authority is

delegated to the schoolmaster, who is entrusted with the bringing up and discipline of the child, must to some extent include an authority over the child while he is outside the four walls. It may be a question of fact in each case whether the conduct of the master in inflicting corporal punishment is right. Very grave consequences would result if it were held that the parent's authority was exclusive up to the door of the school, and that then, and only then, the master's authority commenced; it would be a most anomalous result to hold that in such a case as the present the boy who had been assaulted had no remedy by complaint to his master, who could punish the assailant by a thrashing, but must go before the magistrate to enforce a remedy between them as citizens. Not only would such a position be unworkable in itself, but the Code, which has the force of an Act of Parliament, clearly contemplates that the duties of the master to his pupils are not limited to teaching. A grant may be made for discipline and organization, and it is clear that he is entrusted with the moral training and conduct of his pupils. It cannot be that such a duty or power ceases the moment that the pupil leaves school for home; there is not much opportunity for a boy to exhibit his moral conduct while in school under the eye of the master: the opportunity is while he is at play or outside the school; and if the schoolmaster has no control over the boys in their relation to each other except when they are within the school walls, this object of the Code would be defeated. In such a case as the present, it is obvious that the desired impression is best brought about by a summary and immediate punishment. In my opinion parents do contemplate such an exercise of authority by the schoolmaster. I should be sorry if I felt myself driven to come to the opposite conclusion, and am glad to be able to say that the principle shews that the authority delegated to the schoolmaster is not limited to the four walls of the school. It is always a question of fact whether the act done was outside the delegated authority; but in the present case I am satisfied, on the facts, that it was obviously within it. The question of excess is one for the magistrates.

Solicitors for appellant: *Baker & Nairne.*

W. J. B.

C. A.
1892
Dec. 16.

[IN THE COURT OF APPEAL.]

SAUNDERS *v.* WIEL.

Copyright—Design—Registration— Subject-matter — Novelty—View of Westminster Abbey—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 47, 60.

The expression "new and original design" in s. 47 of the Patents, Designs, and Trade Marks Act, 1883, does not import novelty in the subject-matter of the design, but novelty in the application of the design to some article of manufacture.

A design in metal for the handles of spoons and forks represented a view of Westminster Abbey, and was taken from a photograph:—

Held, that such design was a proper subject for registration under the Act.

Adams v. *Cuthbertson* (12 Ch. D. 714) doubted.

APPEAL from a judgment of Cave, J., at the trial of an action for infringement of a registered design.

The plaintiffs, on July 1, 1891, registered a design, No. 175,644, in Class I., namely articles comprised wholly or partly of metal. The nature of the design was described as "Pattern and shape of spoon or fork handle in metal." The design registered was a representation of Westminster Abbey. A die was carved after this design, from which a mould was made in plaster or sand, and from this a metal copy of the design in relief was cast for handles of spoons and forks. The original design was made, by an artist employed by the plaintiffs, from a photograph of the Abbey.

The defendant made and sold metal spoons bearing on their handles a similar representation of the Abbey; and the plaintiffs brought an action against the defendant for infringement of their registered design. The defendant denied the infringement, and contended that the plaintiffs' design was not one which could be registered. The trial took place before Cave, J., without a jury, on August 8, 1892, when the judge gave judgment for the plaintiffs, being of opinion that the design was a fit subject for registration under 46 & 47 Vict. c. 57, and that the defendant had infringed it. The defendant appealed.

Aston, Q.C., and *Danckwerts*, for the defendant. The plaintiffs' design is not new or original, and therefore is not capable of registration. There is nothing new in placing a representation of public buildings on the handles of spoons. Views of St. Paul's and Cologne Cathedral, and other public buildings, have been used in this manner. There is no originality in using a view of Westminster Abbey for the same purpose. It is the common right of anybody to take a view of Westminster Abbey for any purpose he pleases. Such a view is not a design. A copy of any object or picture is not an original design: *Read and Greswell's Design* (1); *Hecla Foundry Co.* v. *Walker* (2); *Bach's Design* (3); *Le May* v. *Welch* (4); *Lazarus* v. *Charles.* (5) Here the copy was made from a photograph, and it has been expressly decided that such a copy is not an original design: *Adams* v. *Cuthbertson.* (6) That case has never been disapproved of. Secondly, if the registration of the plaintiffs' design is valid, the defendant has not infringed it. There is a difference between the two designs, and, the action being for penalties, the plaintiffs must prove their case strictly.

[BOWEN, L.J., referred to *Holdsworth* v. *M'Crea.* (7)]

Cozens-Hardy, Q.C., and *Morton*, for the plaintiffs, were not called on.

LINDLEY, L.J. This was an appeal from a decision of Cave, J., and the question which is raised turns upon the true construction of that part of the Patents, Designs, and Trade Marks Act of 1883 which is comprised in Part III., and relates to designs.

The plaintiffs have registered a drawing under Part III. of the Act. The nature of their design, as stated in their application, is this: "Pattern and shape of spoon or fork handle in metal." When you come to look at the registered design itself—I do not mean the metal spoons which they make—you find that there is the handle of a spoon or fork, and at the top of it a drawing of Westminster Abbey, seen from a particular point of view. You find the two towers with four pinnacles at the top of each tower,

(1) 42 Ch. D. 260.
(2) 14 App. Cas. 550.
(3) 42 Ch. D. 661.
(4) 28 Ch. D. 33.
(5) Law Rep. 16 Eq. 117.
(6) 12 Ch. D. 714.
(7) Law Rep. 2 H. L. 380.

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and the nave foreshortened, and then the end of the transept with two buttresses, and you can see with a glass a pattern engraved on it, which consists of the rose window and other markings on various parts of the Abbey. There is therefore something which answers both to pattern and shape, the shape being the configuration, and the pattern being the engraving on it.

The history of this design is as follows: It appears that photographers had from time to time made photographs of the Abbey, and one photographer had taken a photograph of the Abbey from the point of view selected by the plaintiffs' artist. The plaintiffs' artist says he made his drawing from a photograph, and then carved a die from this drawing, which is used for forming a mould in plaster or sand, or some other substance, into which the metal of the top of the spoon is run. The plaintiffs are silversmiths and make these spoons. As regards the defendant's spoon, we have only to look at the two spoons to see that there is no substantial difference; and it is plain that the defendant has infringed the plaintiffs' rights, if the plaintiffs have any exclusive rights; and that is the real question which has been argued before us.

Now, it is said that there is no sufficient novelty in the design registered by the plaintiffs. To determine this, we must look at the Act of Parliament and see what it means. The two sections which are important are ss. 47 and 60. Sect. 47 runs thus: "The comptroller may, on application by or on behalf of any person claiming to be the proprietor of any new or original design not previously published in the United Kingdom, register the design under this part of the Act." Then s. 60 must be read with that, and s. 60 runs thus: "In and for the purposes of this Act, 'design' means any design applicable to any article of manufacture, or to any substance artificial or natural, or partly artificial and partly natural, whether the design is applicable for the pattern or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes" (these plaintiffs have taken "pattern and shape") "and by whatever means it is applicable," whether by printing, painting, modelling, casting, embossing, or any other way. Then follows this, which

is important: "Copyright"—that, of course, means copyright in designs—"means the exclusive right to apply a design to any article of manufacture or to any such substance as aforesaid in the class or classes in which the design is registered."

Now, taking those two sections together, what we have to consider is this: Whether this registered design—for a design of some sort, of course, it is—is a design applicable for the pattern and for the shape to things in Class I., and in particular to forks and spoons, and whether it is a new or original design not previously published in the United Kingdom. Why is it not? Has such a design applicable to metals ever been seen before? If you ask that question, you are told this: "Yes, if you mean a view of public buildings, or if you mean a view of cathedrals and churches, they are common enough; therefore, there is no novelty in the idea." But if you ask a little closer, whether anybody has previously taken this particular aspect of Westminster Abbey and used it as a design applicable to things in Class I. or to any things like it, the answer is, "No, that is new, and never has been published before." That answer seems to me to bring the plaintiffs' case within the Act of Parliament; and I think the answer to the argument adduced by the defendant is this: he says the Abbey is not a design within the meaning of this Act of Parliament. In one sense, of course, it is a very valuable design. If an architect was thinking about building an abbey, having Westminster Abbey before him, it would be a very valuable design; but it is not a design within s. 60 until you come to apply it as a design to some article of manufacture, and, therefore, you cannot say that, abstractly and as a general proposition, Westminster Abbey is a design. Then it is said the photograph is a design. The answer is, the photograph, whatever it may be in other Acts, is not a design within this Act until you apply it to something. The plaintiffs are not infringing the copyright of the photographer, or, if they are, we need not discuss that. What they are doing is this: they are making precisely the same use of the photograph which they might have made of the Abbey itself, and they are doing nothing more than taking that which anybody can see, if he chooses to go down to Westminster Abbey, and applying what is there to be

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seen for a particular purpose. They bring themselves within both s. 60 and s. 47. There is no case which militates against anything which I have said or the view which I am disposed to take of this matter, and which is the view of the learned Judge, except the case before Vice-Chancellor Malins of *Adams* v. *Clementson*. (1) That case turned on the older Act of 5 & 6 Vict. c. 100, s. 3, which is worded somewhat differently from the corresponding sections of the Act of 1883; and I strongly suspect, without knowing, for I have not looked into it, that the point, which was not brought out with sufficient prominence in the case of *Adams* v. *Clementson* (1), has led to a slight variation in the language of this Act of Parliament. I cannot help thinking that the Vice-Chancellor there, even under the old Act, slipped into an erroneous view and took "design" rather as an abstract design instead of a design applicable to particular modes of manufacture. I cannot help thinking that he made a mistake in that respect; but the language of the Act there was by no means so pointed as it is here, and I rather suspect that the language has been made more pointed in order to prevent such a decision as that. However that may be, I am of opinion that the judgment in this case is right, and that the appeal must therefore be dismissed in the usual way.

BOWEN, L.J. I am of the same opinion. We must begin by asking ourselves what is the meaning of the term "new or original design not previously published in the United Kingdom," which is the term used in s. 47 of the Patents, Designs, and Trade Marks Act. The argument for the defendant really does come to this, it seems to me, that what the Act requires is novelty in the idea itself. That is not the language of the section, in the first place. It deals with novelty or originality in the *design*; that is to say, in a combination calculated to produce a particular end—novelty in the way in which the idea is to be rendered applicable to some special subject-matter. But when you come to s. 60, it becomes even more clear that it is the sense in which novelty in the design is used, because "design" is, by the limitation of the interpretation clause, confined to designs which are applicable

(1) 12 Ch. D. 714.

to any article of manufacture—to take only that portion of the definition which applies in the present case and which is necessary for our present purpose. You cannot, therefore, wander away from the sections and the subject-matter of the Act, and consider whether an idea, which is totally remote from the subject-matter, is a novel idea or not. You must regard and test its novelty throughout as that novelty which is expected and demanded from a design intended to be applicable to an article of manufacture. When you get thus far, it is obvious, in the first place, that Westminster Abbey is not a design. The photograph is not a design. The photograph is that from which the design is taken, just as, if the step of the process of photography had been omitted and the artist had gone straight to the Abbey, he would have made his design from the Abbey, but he would not have converted the Abbey into a design. It seems to me that the novelty and originality in the design, within this section, is not destroyed by its being taken from a source common to mankind. The novelty may consist in the applicability to the article of manufacture of a drawing or design which is taken from a source to which all the world may resort. Otherwise it would be impossible to take any natural or artistic object, and to reduce it into a design applicable to an article of manufacture, without altering the design so as not to represent exactly the original. You could not take a tree and put it on a spoon, unless you drew the tree in some shape in which a tree never grew; nor an elephant, unless you carved a kind of elephant which had never been seen. An illustration, it seems to me, may be borrowed from what we all know as Apostles' spoons. The figures of the Apostles are figures which have been embodied in sacred art for centuries, and there is nothing new in taking them as the idea; but the novelty of applying the figures of the Apostles to spoons was in contriving to design the Apostles' figures so that they should be applicable to that particular subject-matter. How does the case of a public building differ from the case of the figures of the Apostles? In no sense, it seems to me; and the photograph of a public building stands on the same footing. The answer to the whole argument of the appellant is that it is not the natural object which is the design; that it is not the photograph which

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is the design. The novelty of the design consists in so contriving the copy or imitation of the figure, which itself may be common to the world, in such a manner as to render it applicable to an article of manufacture.

With regard to *Adams* v. *Clementson* (1), I can only say that, unless some distinction can be drawn with respect to the Act under which the Vice-Chancellor was deciding, which renders it unlike this particular Act, in the absence of any clause like s. 60, I doubt whether the decision was right. I also think that, although s. 60 says what is the meaning of "design" in s. 47, it would be possible to extract such a meaning from s. 47 alone, when interpreted by common sense, and by the scope and context of the Act of Parliament.

A. L. SMITH, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Gresham, Davies, & Son.*
Solicitors for defendant: *Maddisons.*

M. W.

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THE THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED *v.* PITTS, SON, & KING.

Insurance, Marine — Policy — Warranty — Average — Stranding — Goods in Lighters at time of Stranding of Ship — Construction of Valued Policy — Inclusion of Advanced Freight as part of Value of Goods.

A cargo of maize was insured from San Nicolas and Buenos Ayres to a port in Europe; the subject-matter of the insurance was described in the policy to be "26,910 bags of maize from San Nicolas, 6065*l.* at 1 per cent.; 8299 bags of maize from Buenos Ayres, 1875*l.* at $\frac{7}{8}$ per cent."; and the policy contained a further statement that by agreement the goods were valued at "7940*l.* (included 1361*l.* 6*s.* 6*d.* for advance on freight)." The policy covered all risks in craft, and contained a warranty against particular average, unless the ship or craft should be stranded. The 26,910 bags were shipped at San Nicolas; but while on her way down the river to Buenos Ayres the ship was stranded; at that time the 8299 bags were in lighters in Buenos Ayres roads awaiting her arrival. Ultimately the ship was got off and proceeded to Buenos Ayres, where she was surveyed and found to be seaworthy; the cargo from San Nicolas (which had been taken out) was re-shipped, the 8299 bags waiting in the lighters were put on board, and the ship proceeded on her voyage to Europe, in the course of

(1) 12 Ch. D. 714.

which a large part of the cargo was damaged by water owing to perils of the seas. It was admitted that a claim for particular average in consequence of the stranding arose in respect of the bags shipped at San Nicolas; but the assured claimed to be entitled to recover also in respect of the bags shipped at Buenos Ayres; they further contended that the loss should be calculated upon the full 7940*l.* without any deduction in respect of freight advanced.

Held, first, that, as at the time of the stranding of the ship the 8299 bags were only at risk in the craft and not at risk in the ship, the warranty attached, and the assured were not entitled to recover a particular average loss in respect of such bags; secondly, that the policy was to be treated as one policy upon valued goods, and not as a policy by which advanced freight was separately insured, and that therefore the particular average loss should be calculated upon the full amount of 7940*l.*

SPECIAL CASE stated by consent under Order XXXIV., r. 1, from which the following facts appeared.

1. The action was brought to recover money had and received by the defendants for the use of the plaintiffs.

2. By a policy of insurance dated September 17, 1890, the charterers hereinafter mentioned insured with the plaintiffs and other insurers certain maize valued at 7940*l.* by the SS. *Craigton* for a voyage at and from San Nicolas and Buenos Ayres to St. Vincent for orders to a port of the United Kingdom or Continent between Bordeaux and Hamburg, both inclusive. The subject-matter of the insurance was described in the policy to be

26,910 bags of maize from San Nicolas, 6065*l.* 1 per cent.

8299 bags of maize from Buenos Ayres, 1875*l.* $\frac{7}{8}$ per cent.

and it was therein stated that the goods were by agreement to be valued at 7940*l.* (included 1361*l.* 6*s.* 6*d.* for advance on freight). The policy included all risks of steam navigation, and in craft, or transhipment, or while waiting transit, and it contained a warranty that the risk should be free from particular average, unless the ship or craft should be stranded, sunk, or burnt, or in collision—the collision to be of such a nature as might be reasonably supposed to have caused the damage.

3. The *Craigton* had on April 2, 1890, been chartered to load a cargo of wheat $\frac{\text{and}}{\text{or}}$ maize in bags, but not exceeding 2550 (10 per cent. more or less) tons English, to be loaded in the river Parana at not more than two safe loading ports or places to be named by the charterers, not higher than Rosario all of the cargo with the exception of 550 tons, which were to be shipped

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in Buenos Ayres roads. The freight was to be at the rate of 30*s.* for cargo loaded up river, and 22*s.* for cargo loaded at Buenos Ayres, all per ton of 2240 lbs. gross weight delivered of maize, and was to be paid as follows—viz., sufficient cash for ship's use at ports of loading (if required by the master) to be supplied on account of freight at current rate of exchange, subject to 5 per cent. to cover insurance and other charges, and the balance of freight on the right and true delivery of the cargo in cash.

4. The charterers shipped on board the *Craigton* at San Nicolas, in the river Plate, 26,910 bags of maize under the charterparty, and she sailed therewith from the said port towards Buenos Ayres on July 20, 1890.

5. On July 21, 1890, the *Craigton*, while proceeding down the river, stranded under the circumstances shewn in the average statement. About 800 tons of the cargo were discharged into lighters, and on August 2, at 6 A.M., she floated, and proceeded at 7.45 A.M., to Buenos Ayres, arriving in Buenos Ayres roads at 11 A.M. on the same day. Owing to the stranding and to the consequent discharge into lighters, a portion of the cargo was lost, and other portions thereof became wetted and damaged. At the time of the stranding 8299 bags of maize, which were afterwards put on board in Buenos Ayres roads, were in lighters lying in the roads waiting for the *Craigton*.

6. At Buenos Ayres the *Craigton* was surveyed, and found to be seaworthy to continue her voyage. The 800 tons of maize which had been discharged into lighters, and the said 8299 bags of maize waiting in lighters, were then shipped on board her together in Buenos Ayres roads, no distinction or separation being made in taking on board and stowing the different lots. There were no distinguishing marks on any of the bags comprising the cargo, and the bags and their contents were all similar to one another. Bills of lading for 26,910 bags, 7259 bags, and 1040 bags were signed by the master, dated Buenos Ayres, August 9, 1890. The bills of lading together with the policy were assigned by the charterers to the defendants, who became the purchasers of the cargo.

7. The *Craigton* left Buenos Ayres on August 13, 1890, and

during the voyage from Buenos Ayres to the United Kingdom a considerable portion of the cargo was lost, and a large part of the remainder was damaged by water owing to perils of the seas.

8. The *Craigton* eventually arrived at Plymouth on September 22, and a claim was made upon the plaintiffs and other underwriters under the policy for a payment on account of the said losses and damage.

9. On December 16, 1890, the plaintiffs, on account of any claim which the defendants might be able to establish under the policy in respect of the damage, but without prejudice, paid to the defendants the sum of 250*l.* A memorandum of the payment of the said amount was indorsed on the policy.

10. Average statements, dated June 2, 1891, and Sept. 25, 1891 (which were attached to, and formed part of, the case) were prepared, from which it appeared, and it was admitted in the case, that there had been a particular average loss on the whole of the maize, and that (subject to the defendants' contention thereinafter mentioned), if the defendants were entitled to claim under the policy for a particular average loss on the whole cargo, including the 8299 bags shipped at Buenos Ayres, as well as that shipped at San Nicolas, the plaintiffs were liable under the said policy to pay to the defendants the sum of 269*l.* 11*s.* 3*d.*, shewn in the statement of June 2, 1891; but if the defendants were entitled to claim for a particular average loss only on the portion of the cargo shipped at San Nicolas, and not on the 8299 bags shipped at Buenos Ayres, the plaintiffs were liable to pay to the defendants the sum of 217*l.* 13*s.* 10*d.* only, as shewn in the statement of September 25, 1891.

11. The plaintiffs' claim in the action was for 32*l.* 6*s.* 2*d.*, being the difference between the sum of 250*l.* paid to the defendants by the plaintiffs, and the said sum of 217*l.* 13*s.* 10*d.*, together with interest at 5 per cent. from December 16, 1890.

12. The plaintiffs contended that the warranty "free from particular average" attached to and was in force during the voyage from Buenos Ayres to the United Kingdom in respect of the 8299 bags of maize which were shipped at Buenos Ayres, notwithstanding that the vessel had previously stranded on the voyage from San Nicolas, and before arrival at Buenos Ayres,

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and that therefore the amount due from the plaintiffs to the defendants was 217*l.* 13*s.* 10*d.*, and no more, and they were entitled to recover back the sum of 32*l.* 6*s.* 2*d.*, as money received of the defendants for the use of the plaintiffs.

13. The defendants contended that, having regard to the stranding, they became entitled to claim in respect of the particular average loss on the whole cargo.

14. The defendants also contended that the average statements did not correctly shew the amounts which they were entitled to claim in respect of particular average, because the amount found in the statement of June 2, 1891, was arrived at by taking the value of the cargo for the purpose of particular average at 7940*l.* less 1361*l.* 6*s.* 6*d.*, the freight advanced by the charterers at the ports of loading in accordance with the charterparty, and the amount found in the statement of September 25, 1891, was arrived at by allowing a proportion of the particular average so ascertained in respect of the San Nicolas shipment. The defendants contended that the particular average payable under the policy should have been calculated upon the full 7940*l.* (or the proportion thereof in respect of the San Nicolas shipment) without deduction of the freight advanced.

15. The questions for the opinion of the Court were:—

(*a*) Whether or not the defendants were entitled to claim under the circumstances for the particular average loss on the 8299 bags of maize shipped at Buenos Ayres.

(*b*) Whether in estimating the amount of the particular average loss, the amount of the freight advanced should be deducted from the valuation of the maize in the policy.

16. Should the Court answer question (*b*) in the negative, the amount of the defendants' claim under the policy was to be re-adjusted in such manner as might be directed by the Court, and judgment to be entered in accordance with the result of such readjustment.

17. Should the Court answer question (*b*) in the affirmative, judgment was to be entered for the plaintiffs for 32*l.* 6*s.* 2*d.*, or for the defendants for 19*l.* 11*s.* 3*d.*, according as the Court

should answer question (*a*) in the negative or in the affirmative.

18. In any case interest at 5 per cent. was to be allowed on the amount of the judgment from December 16, 1890, and costs were to abide the event.

Joseph Walton, Q.C. (*Hurst*, with him), for the plaintiffs. As to the first question, the underwriters are not liable in respect of goods which were not on board when the stranding took place. Independently of the clause covering risk of craft, a claim for particular average on these goods is not let in by the stranding. It is true that *Burnett* v. *Kensington* (1) decided that to come within the exception in the memorandum a particular average loss need not necessarily be connected with the stranding; but the goods must be on board the ship at the time she is stranded. The clause covering risk of craft was introduced in consequence of the decision in *Hoffman* v. *Marshall* (2), where it was held that a policy on goods in ship did not cover them while in craft for purposes of loading or discharge. That clause only makes this difference, that it covers the stranding of the craft in which the goods are at risk. In order to let in a claim for particular average, the goods must not only be at risk under the policy, but they must be at risk in the actual ship or craft that is stranded, and at the time that the stranding takes place. Further, there were here in fact two separate voyages: *Biccard* v. *Shepherd* (3): one from San Nicolas to Europe, the other from Buenos Ayres to Europe, and the insurances were on different quantities of goods at different rates of premium for the different voyages. The stranding on the voyage from San Nicolas before the commencement of the voyage from Buenos Ayres cannot therefore let in a claim for particular average in respect of goods which were not to be laden till the ship arrived at Buenos Ayres, and which were not at risk in the ship until then. If the mere stranding of either ship or craft were the condition on which a claim for particular average would be let in, then, if the whole cargo except one bag were safely landed

(1) 7 T. R. 210. (2) 2 Bing. N. C. 383.
(3) 14 Moo. P. C. 471.

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at the end of a voyage, and a lighter with the last bag on board were stranded, a claim for particular average in respect of the whole cargo could be maintained.

Secondly, the amount insured in respect of advanced freight is not part of the value of the goods and should not be included in assessing a particular average loss. The method of computation is to ascertain the difference between the value of the goods in their damaged state at the port of delivery and their value at that port had they not been injured (which would include freight); the proportion so ascertained is then applied to the original value of the goods insured; in an open policy, this would not include freight, but would be practically the value of the goods when shipped with insurance and commission, which shews that an insurance upon goods is not intended to afford the merchant a complete indemnity, but to put him in the situation in which he was at the beginning of the risk. The same principle of computation is applied to a valued policy, but as it is not the object of an insurance upon goods that the merchant should get an indemnity in respect of the freight, money which is expressed in the policy to be insured in respect of freight ought not to be treated as part of the value of the goods. The true meaning of this policy is, that it is one upon advanced freight as well as upon goods; it is in effect two policies; the 1361*l.* is not a mere item in the value of the goods. An interest in advanced freight is different from an interest in goods; it is generally insured separately, and there may be a total loss of one without any loss of the other, while, again, there may be charges on advanced freight which would not be covered by an ordinary policy on goods. If the contention of the defendants is right, that it is part of the value of the goods, there can be no possible object in putting in the words; it would be a piece of unnecessary information.

[He also cited *Lewis* v. *Rucker*. (1)]

Channell, Q.C. (*Carver*, with him), for the defendants. First, the general doctrine of law is, that if the ship be stranded the warranty against particular average is gone altogether and the policy must be construed as though the warranty were not in it,

(1) 2 Burr. 1167.

and even though in a particular case it is proved as a fact that the damage to the goods did not arise through the stranding, yet a particular average loss in respect of them is recoverable; the doctrine is the result of a convention among underwriters in consequence of the difficulty of ascertaining in a particular case whether the damage arose from the stranding or not. Only such a stranding is excluded as could not possibly have caused the damage, such as a stranding which takes place after the goods are actually landed. It cannot be said here, that the stranding could not have caused the damage; the fact that the ship was certified to be seaworthy on leaving Buenos Ayres is by no means conclusive; for she might well be fit for ordinary weather, and yet, by reason of the straining consequent on the stranding, unfit to encounter the exceptional weather which she actually experienced; and it must be remembered that it was to this straining that the surveyors attributed the large amount of damaged cargo. The essential point is that the stranding should be a potential, though not the actual or proximate, cause of the damage, and this is clearly a stranding which might have been the cause. It is admitted that in respect of the goods put on board at San Nicolas the shippers are entitled to recover for the damage caused during the voyage to Europe simply because of the stranding; yet it is contended that they are not entitled to recover in respect of those shipped at Buenos Ayres, although they are insured in the same words in the same policy. This shews the rule as to a stranding letting in a claim for particular average to be the result of a convention; and there is as much practical reason for allowing the one claim as the other.

Secondly, advanced freight on particular goods is merely an addition to the value of the goods; it stands on the same footing as premiums of insurance and commission, and even in the case of an open policy it might, perhaps, be successfully contended that it was one of the expenses of the shipper at the port of shipment against which the insurance was intended to indemnify him; he can, of course, protect himself by valuing his goods in the policy, so as to include the advanced freight. The form of the policy in this case does not amount to a separate policy on advanced freight as well as a policy on goods; it is one policy

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on goods valued at an amount which includes the advanced freight.

[He cited *Usher* v. *Noble*. (1)]

DAY, J. This is an action brought by underwriters to recover money paid by them in respect of an alleged loss under a policy of insurance. An average statement was prepared, which we have before us, and the claim of the plaintiffs may be considered under two heads: the first, a claim to recover a sum of money not clearly ascertained, but as to which an important principle is involved, the ground of the claim being that a portion of the goods insured by the policy was not on the ship at the time of stranding; the second, a claim founded on the contention that, by the very terms of the insurance, the policy covers advanced freight as well as the value of the goods. The policy was entered into for the insurance of a quantity of maize to be shipped on one particular ship at ports in the Argentine Republic and carried to Europe, and it is expressed to be a policy on 26,910 bags from San Nicolas, value £6065, at 1 per cent., and 8299 bags from Buenos Ayres, value £1875, at $\frac{7}{8}$ per cent.; it therefore covers two different lots of maize from two different ports of shipment, of different values, and at different rates of insurance.

The facts of the case are simple. On the passage down the river from San Nicolas to Buenos Ayres, the ship, having the 26,910 bags of maize on board, was undoubtedly stranded; she was eventually got off and taken down the river to Buenos Ayres, where she took on board from lighters the 8299 bags, and proceeded with the whole cargo to Europe; on her voyage the whole of the maize was damaged by perils of the sea, and the assured made a claim against the underwriters in respect of a particular average loss. The policy contained the usual warranty against particular average loss, and the usual exception covering the stranding of the ship or craft. Now this ship was stranded, and it is said that because she was stranded the assured are entitled to recover in respect not only of the damage to the 26,910 bags, which at the time of the stranding were on board and

(1) 12 East, 639.

at risk under the policy, but also for the particular average loss to the 8299 bags which were not on board at the time, but were put on board after the ship had recovered from the stranding and had been certified as seaworthy. The 8299 bags were at the time of the stranding in craft off Buenos Ayres, awaiting the arrival of the ship from San Nicolas; they were not damaged while in the craft, or in any way affected or prejudiced by the stranding; they were put on board at Buenos Ayres, and in the course of the voyage to Europe were injured by perils of the sea, the whole of the maize on board being damaged. The first question for us to decide is, whether the assured are entitled to recover in respect of a particular average loss on the 8299 bags, which were not put on board at San Nicolas, but at Buenos Ayres, and at the time of the stranding were in craft awaiting the arrival of the ship off Buenos Ayres.

I have come to the conclusion that the claim of the assured is ill-founded, and that they have no claim in respect of the maize not on board the ship at the time of the stranding. If we consider the character of this policy, it is no doubt one policy in this sense, that it is contained in one paper and is made between one cargo-owner and one underwriter or set of underwriters; but in one sense it is a policy to cover two different voyages, one from San Nicolas to Europe, the other from Buenos Ayres to Europe, though the routes from Buenos Ayres to Europe are of course the same. Although the goods are in the same ship, the risk insured against is a different risk in the one case to what it is in the other: in one it lasts all the way from San Nicolas; in the other it is limited to the voyage from Buenos Ayres; and it is further to be noted that the respective lots of maize are of different weights and values, and the rates of premium are different. It is difficult to suppose that there could be any argument on behalf of the assured, but for the special conditions in the margin of the policy: "Including all risks of steam navigation, and in craft or transhipment, or while waiting transit, $\frac{\text{and}}{\text{or}}$ any conveyances from the shippers' warehouses to those of the consignees. Each craft or the total loss of any package to be considered as if separately insured." Those conditions apply to the maize when in craft;

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and undoubtedly under this policy the maize when in craft was insured, and if any misfortune happened to it in craft the assured could recover on the policy. But though insured while in craft, it does not follow that the maize was insured at the same moment, both as being in craft and as being in the ship. It is in craft at one time and in the ship at another, and the two periods of time are consecutive, not contemporaneous; it is insured in the craft while it is in the craft, and in the ship while it is in the ship, the risks and incidents of the policy being equally applicable whether it is in craft or ship. When this ship was stranded the goods were in craft, and I think that as regards them the only stranding for which the underwriters could be responsible under the policy would be a stranding of the craft while the goods were in craft. To deal in any other way with the provisions of this policy would be to place an inconvenient and unreasonable construction on the warranty. In my opinion, the warranty and the exception are merely incidental to the risk; without the risk there is no warranty and no exception; here there was no risk as to this part of the cargo at the time of the ship's stranding, for it was not in the ship, and therefore neither the warranty nor the exception is applicable. In my opinion, there were here substantially two insurances of different lots of maize at different rates for different voyages, and this stranding is only to be taken advantage of by those persons who were at that time paying the higher rate of insurance upon the longer voyage in respect of goods then on board and at risk, and the defendants are not entitled by reason of this stranding to recover in respect of a particular average loss upon the maize which was then in craft, against which they have in my judgment warranted the underwriters. The plaintiffs are therefore entitled to recover the sum of money overpaid by them applicable to the particular average loss on the 8299 bags which has been allowed by the average adjusters to the assured.

Upon the second question asked us, I am of opinion that the defendants have an answer to the plaintiffs' claim, and that they have made out that the amount allowed in respect of advanced freight ought to be allowed by the average adjusters to the assured. Putting the best construction that I can upon this

policy, it seems to me that it is really an insurance on valued goods, and that it is not vitiated by reason of the fact that out of abundant caution the merchant has said that he has taken into account as part of the value the money paid on account of freight, and that he values the goods, not at the port of purchase, but at the port of their destination. I cannot think that he loses the benefit of a valued policy on his goods by saying that he takes their value at the port of destination, and further stating the amount of money which, in order to arrive at that value, he has added to their cost at the port of shipment. It seems to me that this is quite legitimate, and that the policy is not affected by the merchant saying how he works this sum. The policy should not be treated as one on valued goods to a lesser amount, with a further policy in respect of freight, but as a policy on valued goods, with an explanation of the way in which the amount is arrived at. I think, therefore, that upon this branch of the case the plaintiffs' claim fails.

COLLINS, J. I am of the same opinion. As to the first point, it is said that the plaintiffs are entitled to recover the amount received by the defendants as upon a particular average loss in respect of the 8299 bags in consequence of the ship having stranded, and the question is whether there was such a stranding as would let in the right of the assured to recover in respect of a particular average loss on these bags. I think there was not. The claim arises in respect of bags of maize shipped at Buenos Ayres; but the policy also embraces maize shipped at San Nicolas. Before these bags were put on board the vessel was stranded, and it is contended that that stranding is a stranding which enables the owner of the bags shipped at Buenos Ayres to say that within the meaning of the contract of insurance there has been such a stranding as would entitle him to claim for a particular average loss in respect of them.

The answer to the question seems to depend on whether or not the stranding took place during the adventure. If it did, it is clear law that it is immaterial whether the actual mischief can be traced to the stranding; but that is a very different thing from saying that it is immaterial when the stranding took place.

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The stranding is dealt with by the contract between the parties, under which it is one of the risks insured against. If the stranding takes place within the time contemplated by the parties, the insured can recover in respect of a particular average loss whether the damage can be traced to the particular stranding or not. This proposition is not only in accordance with common sense, but is abundantly supported by authority. In *Roux* v. *Salvador* (1), which follows the earlier decisions, the point decided was that, where during a voyage the ship sprung a leak and the goods were landed and sold at a port short of their original destination, and the ship was afterwards stranded on her voyage to the port of destination when those goods were no longer on board, there was no particular average loss in respect of which the assured could recover; and in order to reach this decision it was necessary to examine the principle, and that principle applies equally to a stranding before the risk has attached to the goods as to a stranding after the risk has ceased to attach. In his judgment in that case, Tindal, C.J., said: "The general principle laid down in *Burnett* v. *Kensington* (2), that if the ship be stranded the insurer is liable for any average damage, though quite unconnected with the stranding, is not disputed; the policy, after the stranding, must be construed as if no such warranty had been written on the face of it. But the question is, within what limits of time a stranding must take place in order to produce such effect. Now every other clause in the policy relates to the voyage insured, and to that alone; the liability of the underwriter on goods commences with the putting them on board, and ceases upon their being discharged and safely landed, or with any other legal termination of the adventure. The clause in question, therefore, as it appears to us, ought to be construed with the same restriction; and the stranding, which is made the condition of letting in an average loss, ought, upon the ordinary rules of construction, to be considered to mean a stranding which takes place after the adventure has commenced and before it has terminated."

If we consider the reason for this rule it is obvious that it must be so. A stranding has taken place during an adventure, and the question arises (or rather used to arise) whether the

(1) 1 Bing. N. C. 526. (2) 7 T. R. 210.

particular damage is capable of being attributed to that stranding. To embark upon that inquiry necessarily involved such a long and difficult examination of the circumstances, that by convention of the parties, as Lord Kenyon put it in *Nesbitt* v. *Lushington* (1), where a ship stranded, the underwriters agreed to ascribe the damage to the stranding; but in order to so ascribe it, the stranding must take place in the course of the adventure. Does this case come within that principle? The defendants contend that it does, and that the stranding did take place in the course of the adventure, because the goods were at risk. But that only puts the difficulty one stage further off, and we must inquire, not merely whether the goods were at risk, but whether they were at *the* risk contemplated in the adventure. In my opinion, they were not. The adventure contemplated in the provision as to stranding of the ship is limited to the time after which the goods are put on board the ship; the anterior state of things is dealt with by a separate contract or a separate specific provision covering the time when the goods are in craft. But for that provision as to risk while in craft, it could not be contended that the antecedent stranding would let in a right to claim in respect of a particular average loss, subject to this remark, that the defendants contend that the antecedent stranding was traceable in its effect upon these particular goods, and did as a fact cause part of the damage to them. As to this, it is said that the stranding so affected the ship, and put her in such a condition, that the subsequent straining brought about damage to the goods, which would not have happened but for the antecedent stranding. But that point is, I think, disposed of by the fact that the ship was surveyed and found seaworthy at the commencement of the adventure—that is, when the goods were put on board at Buenos Ayres—which prevents the antecedent stranding having any connection in point of fact with the subsequent damage. Moreover, when analysed, this seems to be really the same point that we have already decided, and to be an attempt to introduce into the adventure something that happened before the adventure. Upon the first part of the case, therefore, I am of opinion that the plaintiffs have made out their claim.

(1) 4 T. R. 783.

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The second point is whether the ascertained percentage should be allowed as upon the whole value of £7940, or only upon that value less £1361, the amount of the advanced freight. It seems to me that the question for us is simply a question of the meaning of the parties in framing the contract in these terms. Did they intend to insure cargo agreed at a certain value, or did they intend to insure cargo agreed at a certain value and advanced freight at an ascertained amount? If the latter, the defendants are wrong; if the former, they are right. Looking at the whole of the language, I think that what they meant was to value the cargo, and to insure a valued cargo. They valued the goods and merchandize, and gave them a conventional value by an agreement between assurer and assured—£7940, including £1361 for advance on freight. By adding those words they have not, as it seems to me, entitled themselves to say that they have acquired an insurance upon advanced freight, and they could not maintain such a position if the underwriters disputed it. The underwriters might well answer, "Although it is true that you mentioned this sum as advanced freight, yet in the same sentence you agreed that it should be treated as part of the value of the cargo, and therefore, if the circumstances do not admit of your recovering as upon a loss of the goods, the contract does not entitle you to claim as upon an independent insurance on advanced freight." The advanced freight is simply thrown in as part of the value of the goods, and in my judgment the right to recover in respect of advanced freight stands or falls with the right to recover for loss of cargo. Upon that part of the case, therefore, the inference which I draw is in favour of the defendants.

As the result of our answers to the questions asked in the case, the claim of the defendants upon the policy will be re-adjusted by calculating the particular average on £6065, the value of the maize shipped at San Nicolas, without deduction in respect of the advanced freight.

Judgment accordingly.

Solicitors for plaintiff: *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for defendants: *Crowders & Vizard, for Shelly & Johns, Plymouth.*

W. J. B.

Applied. HENKELL *v.* CONTINENTAL EXPRESS, LTD. [1950] 1 All E.R. 1033.

[1893] 1 Q. B. 491. LE LIEVRE *v.* GOULD.

Followed. CANDLER *v.* CRANE, CHRISTMAS & Co. [1951] 2 K. B. 164

[IN THE COURT OF APPEAL.]

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LE LIEVRE AND DENNES *v.* GOULD.

Negligence—Surveyor—Mortgage—Certificate as to Progress of Buildings—Untrue Statement—Breach of Duty—Liability of Surveyor to Mortgagee in absence of Contract or Fraud—Action of Deceit.

Mortgagees of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mortgagees, and there was no contractual relation between him and them. In consequence of the negligence of the surveyor the certificates contained untrue statements as to the progress of the buildings, but there was no fraud on his part:—

Held, that the surveyor owed no duty to the mortgagees to exercise care in giving his certificates, and they could not maintain an action against him by reason of negligence.

Derry v. *Peek* (14 App. Cas. 337) considered.

Heaven v. *Pender* (11 Q. B. D. 503) distinguished.

Cann v. *Willson* (39 Ch. D. 39) overruled.

APPEAL by the plaintiffs against the refusal of a Divisional Court (Wills and Collins, JJ.) to set aside the judgment of one of the official referees in favour of the defendant.

The plaintiff Dennes was a mortgagee of land at Ilfracombe, and two houses which were being built on it, under a building agreement between William Hunt, the owner of the land, and William Lovering, a builder. The other plaintiff, Miss Le Lievre, was transferee of the mortgage. The plaintiffs claimed a declaration that the defendant, who was an architect and surveyor, was liable to make compensation to them for the loss which they alleged they had sustained by reason of some certificates which he had given as to the progress made in the building of the two houses, which certificates were in fact untrue; and payment accordingly. It had been agreed that the mortgage money should be advanced in instalments at certain specified stages in the progress of the building.

By the building agreement, dated August 23, 1889, and made between Hunt (described as the vendor) and Lovering (described as the purchaser), it was provided that, in consideration of a perpetual yearly rent of 12*l.* 12*s.* to be issuing and payable

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to the vendor out of the land and the buildings to be erected thereon, and of certain covenants and agreements on the part of the purchaser, the vendor thereby agreed to grant and convey, and the purchaser agreed to take, the specified plot of land, subject nevertheless to the reservation of the said yearly rent payable as therein mentioned. And the purchaser thereby agreed with the vendor, as a condition precedent to the fulfilment of the agreement thereinbefore made on his part (inter alia), that he would before June 24, 1890, to the satisfaction of the vendor or his architect for the time being, build upon the land two dwelling-houses, and no more, of the value of 1000*l.* at the least.

Lovering desired to obtain a loan of money to enable him to build the houses, and he applied to Hunt to make him an advance for the purpose. Hunt agreed to procure him a loan of 850*l.*, to be advanced in instalments. A schedule of advances, dated November 21, 1889, was prepared, which provided that the 850*l.* should be advanced on the two houses in instalments; the first of 50*l.*, and the remainder each of 100*l.*, at certain specified stages in the progress of the work. The final instalment was to be advanced when the houses were "complete with paper, paint, fittings, taps, ground laid out, and the whole finished and in proper order."

Hunt arranged with the plaintiff Dennes that he should advance the 850*l.* to Lovering upon the security of a mortgage from him. Hunt also agreed with the defendant Gould, who was an architect and surveyor at Ilfracombe, that he should give certificates from time to time that the work had reached the respective stages at which the respective instalments were to be advanced as provided by the schedule of advances, a copy of which was given to the defendant. This agreement with the defendant was made before the execution of the mortgage next stated.

By a deed of mortgage, dated November 30, 1889, between Lovering and the plaintiff Dennes, after a recital of the building agreement of August 23, 1889, and a recital that the mortgagee had agreed to make advances of money to the mortgagor from time to time, in order to enable him to erect and complete the houses on the land comprised in that agreement, and pursuant thereto, upon having the repayment thereof,

with interest, secured in the manner in the mortgage expressed; the mortgagee thereby covenanted with the mortgagor that the mortgagee would advance to the mortgagor such sums of money as were next thereinafter mentioned, viz., 50*l.* immediately on the execution of the mortgage, and, for and in respect of the two houses to be built by the mortgagor on the land comprised in the agreement and pursuant thereto, the further sum of 800*l.*, to be advanced in such instalments as the mortgagee or his surveyor should from time to time certify and appoint. Provided always, that the mortgagee should not be obliged to lend at any time more than the total sum of 850*l.* under the mortgage, and also that the mortgagee should not be bound to make any such advance unless and until his surveyor should have certified in writing that the house or houses in respect of which the advance was to be made had been so proceeded with to the satisfaction of such surveyor, and in conformity with the building agreement, so as to entitle the mortgagor to the advance certified. There was a covenant by the mortgagor for the repayment of the sums advanced, with interest. And the mortgagor, as beneficial owner, thereby conveyed unto the mortgagee the piece of land comprised in the building agreement, and the benefit of that agreement, subject to redemption on payment of the mortgage money and interest in accordance with the covenant in that behalf.

The defendant Gould was not aware of the contents of this deed.

The first instalment of 50*l.* was advanced by Dennes to Lovering in December, 1889, and four other instalments of 100*l.* each were advanced by Dennes to Lovering on the footing of written certificates, respectively signed by the defendant Gould, and respectively dated January 30, March 1, April 24, and July 3, 1890. These certificates were addressed "to W. Hunt, Esq." By the second certificate, Gould certified "that the sum of 100*l.* is due to William Lovering, Ilfracombe, on account of villas in Kingsley Avenue, as per schedule of advances.

"Amount previously certified . . .	£50
"This certificate	£100
"Total amount certified	£150"

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The other certificates were in a similar form.

On October 27, 1890, Dennes transferred his mortgage debt of 450*l.*, and the interest then due, together with the benefit of his security, to the plaintiff Miss Le Lievre. The subsequent instalments of the 850*l.* were advanced by her to Lovering upon the footing of similar certificates signed by Gould, the final certificate being dated May 23, 1891.

The plaintiffs in their statement of claim alleged that Hunt, in employing Gould to give the certificates, and also in preparing the schedule of advances, was acting as the agent of the plaintiff Dennes. It was also alleged that the certificates when given were untrue in fact to the knowledge of Gould, and that, even if there were no fraud on his part, the defendant did not use due care, skill, and diligence to ascertain whether the facts to which he certified were true, and that in so giving the certificates the defendant acted with gross negligence, and in breach of the duty which he owed to the plaintiffs.

By his statement of defence, the defendant denied that he had been employed by Dennes or on his behalf to give the certificates, or that he ever undertook any duty towards the plaintiffs or either of them. The defendant denied the charge of fraud, and said that in giving the certificates he acted bonâ fide, and in the belief that the statements contained in the certificates were true.

The action was referred for trial before an official referee. It was admitted at the trial that the defendant's certificates were in fact inaccurate. For instance, the defendant admitted that, when he gave the last certificate with reference to the last instalment of the 850*l.*, which, according to the schedule of advances, was to be advanced when the houses were "complete with paper, paint, &c.," the houses had not in fact been papered, though he did not then know that they were not. He said that he had been informed by Lovering that he had arranged with a tenant to take the houses, and that he would paper them. The defendant, therefore, assumed that they were, or would shortly be, papered.

The official referee held upon the evidence that Hunt, in employing the defendant to give the certificates, had not acted as the agent of the plaintiffs; that there was no contractual

relation between the plaintiffs and the defendant; and that there had been no fraud on the part of the defendant.

And, as a matter of law, the official referee held that the defendant owed no duty to the plaintiffs, and that the action could not be maintained. Judgment was accordingly given for the defendant.

The plaintiffs applied to the Divisional Court to set aside the judgment, and their application was refused.

The plaintiffs appealed.

Jelf, Q.C., and *Montague Lush*, for the plaintiffs. The true conclusion from the evidence is, that Hunt in employing the defendant was acting as agent for the plaintiff Dennes, who was his undisclosed principal.

Independently of contract, the defendant owed a duty to the plaintiffs to exercise due care in giving his certificates. He knew, or ought to have known, that the certificates would or might be acted upon for the purpose of obtaining advances of money to the builder; he was grossly negligent in not ascertaining whether the facts to which he certified really existed, and he is liable to the plaintiffs for his breach of duty: *Heaven* v. *Pender* (1); *Cann* v. *Willson*. (2)

[BOWEN, L.J., referred to *Angus* v. *Clifford*. (3)]

The finding of the official referee that there was no fraud on the part of the defendant only means that he had no corrupt motive. But the result of the evidence is that he recklessly made a representation which was untrue in fact, not caring whether it was true or false, and taking no trouble to ascertain the facts. This is not inconsistent with the finding of the official referee, and such conduct amounts in law to fraud: *Derry* v. *Peek*. (4)

In that case Lord Herschell (at p. 366) quoted the explanation of *Polhill* v. *Walter* (5), given by Maule, J., in *Crawshay* v. *Thompson* (6), "If a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure; that is the effect of *Polhill* v. *Walter*." (5)

(1) 11 Q. B. D. 503.
(2) 39 Ch. D. 39.
(3) [1891] 2 Ch. 449.
(4) 14 App. Cas. 337.
(5) 3 B. & Ad. 114.
(6) 4 Man. & G. 357, at p. 382.

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The dicta of Romer, J., in *Scholes* v. *Brook* (1), may be inconsistent with *Cann* v. *Willson* (2), but they are only dicta, and at any rate they do not bind this Court. The defendant made a representation either knowing it to be untrue, or not caring whether it were true or false, knowing, too, that the plaintiffs would act upon it. That is fraudulent conduct.

[BOWEN, L.J., referred to *Low* v. *Bouverie*. (3)]

Upjohn, for the defendant, was not heard.

LORD ESHER, M.R. In my opinion the decision of the Divisional Court was right. It is said that a relation by contract existed between the plaintiff Dennes and the defendant, and that one of the implied terms of that contract was that the defendant in giving the certificates should use reasonable care to ascertain the truth of the facts to which he certified. There can be no doubt that, if there was a contract, there was such a term implied in it. But there is really no evidence of any contract between the plaintiff Dennes and the defendant, and in truth there was no such contract. The contract with the defendant was made by Hunt, the vendor of the land comprised in the building agreement; one Russell, who actually made the contract, had the authority of Hunt, and of no one else, to make it on behalf of Hunt, not on behalf of Dennes. At that time Dennes was not the mortgagee of the property; he had no relation whatever to the matter. It is true that he had talked about advancing money to Lovering (the builder), but he had not then done so, and he stood in no relation, legal or equitable, to the matter. How could he be at that time an undisclosed principal of Hunt? He was not a principal at all, and certainly not an undisclosed principal.

Then it is said that, even if there was no contract between the plaintiff Dennes and the defendant, nevertheless the defendant is liable to the plaintiffs for having given certificates which contained untrue statements; for, it is said, the defendant owed a duty to the plaintiffs to exercise care in giving the certificates, because he knew that the plaintiffs would or might act upon

(1) 63 L. T. 837. (2) 39 Ch. D. 39.
(3) [1891] 3 Ch. 82.

them by advancing money to Lovering. No doubt the defendant did give untrue certificates; it was negligent on his part to do so, and it may even be called gross negligence. But can the plaintiffs rely upon negligence in the absence of fraud? The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them. The case of *Heaven* v. *Pender* (1) has no bearing upon the present question. That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property. For instance, if a man is driving along a road, it is his duty not to do that which may injure another person whom he meets on the road, or to his horse or his carriage. In the same way it is the duty of a man not to do that which will injure the house of another to which he is near. If a man is driving on Salisbury Plain, and no other person is near him, he is at liberty to drive as fast and as recklessly as he pleases. But if he sees another carriage coming near to him, immediately a duty arises not to drive in such a way as is likely to cause an injury to that other carriage. So, too, if a man is driving along a street in a town, a similar duty not to drive carelessly arises out of contiguity or neighbourhood. That is the effect of the decision in *Heaven* v. *Pender* (1), but it has no application to the present case. This was pointed out by Romer, J., in *Scholes* v. *Brook* (2), though it was hardly necessary to do so. No doubt, if *Cann* v. *Willson* (3) stood as good law, it would cover the present case. But I do not hesitate to say that *Cann* v. *Willson* (3) is not now law. Chitty, J., in deciding that case, acted upon an erroneous proposition of law, which has been since overruled by the House of Lords in *Derry* v. *Peek* (4), when they

(1) 11 Q. B. D. 503.
(2) 63 L. T. (N.S.) 837.
(3) 39 Ch. D. 39.
(4) 14 App. Cas. 337.

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restated the old law that, in the absence of contract, an action for negligence cannot be maintained when there is no fraud. If that were not so, then, in a case in which an action is brought against directors of a company for misrepresentations contained in a prospectus, it would never be necessary to prove that they had been guilty of fraud. But that was never so held, and there is a long line of cases which shew that in such an action it is essential for the plaintiff to prove fraud. The Court of Appeal, by their decision in *Peek* v. *Derry* (1), appeared to have overthrown all those cases. They seemed to have thought that there was a distinction between fraud in a Court of Equity and fraud at Common Law. There is no such distinction. A charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any Court unless it is shewn that he had a wicked mind. That is the effect of *Derry* v. *Peek*. (2) What is meant by a wicked mind? If a man tells a wilful falsehood, with the intention that it shall be acted upon by the person to whom he tells it, his mind is plainly wicked, and he must be said to be acting fraudulently. Again, a man must also be said to have a fraudulent mind if he recklessly makes a statement intending it to be acted upon, and not caring whether it be true or false. I do not hesitate to say that a man who thus acts must have a wicked mind. But negligence, however great, does not of itself constitute fraud. The official referee who tried this case and heard the evidence came to the conclusion that the defendant, though he had acted negligently, had not wilfully made any false statement, or been guilty of any fraud. All that he had done was to give untrue certificates negligently. Such negligence, in the absence of contract with the plaintiffs, can give no right of action at law or in equity. All the grounds urged on behalf of the plaintiffs fail, and the appeal must be dismissed.

BOWEN, L.J. I am of the same opinion.

With regard to the first point, I think it unnecessary to add anything to what has been said by my lord. I will merely say that the plaintiffs' counsel cannot point to a scintilla of evidence that the defendant in giving the certificates was acting as the

(1) 37 Ch. D. 541. (2) 14 App. Cas. 337.

plaintiffs' surveyor. He was the surveyor of another person—Hunt. There was no contractual relation between the plaintiffs and the defendant, and upon that point, therefore, we must decide against the plaintiffs.

I will take the third point next, that is, the point as to fraud. The official referee has found that there was no fraud, that is, that there was no fraud in the sense in which the law understands it,—in other words, that the conduct of the defendant was not dishonest; although it may have led to misconception and mistaken action on the part of the plaintiffs, still it was not dishonest conduct. It is impossible that after that finding we should allow the case to be tried again on the question of fraud, unless there had been something in the nature of surprise or miscarriage. There was nothing of that kind.

The last point is that which was raised upon *Cann* v. *Willson*. (1) It was argued that, although the defendant may not have been dishonest, nevertheless he was grossly negligent, and in a way which, at the end of the chain of cause and effect, caused damage to the plaintiffs, although the defendant was not their surveyor. The defendant as surveyor owed a duty to his employer to be careful in giving his certificates; but did he owe any duty to the plaintiffs? None certainly which arose out of contract. But it is said that he must or ought to have known that his certificates would or might probably be used for the instruction of the plaintiffs, and that the plaintiffs would be guided by them as to advancing their money. That duty, if it existed, would be a duty towards the plaintiffs directly, quite apart from and independent of the duty which the defendant owed to his own employer. *Cann* v. *Willson* (1) has been relied on as proving that such a duty existed, and in that point of view it is necessary for me to refer to *Derry* v. *Peek* (2), which, I think, has overruled *Cann* v. *Willson* (1). *Derry* v. *Peek* (2) decided two things. It decided, first, that a plaintiff cannot succeed in an action of deceit or fraud without proving that the defendant was fraudulent. That any doubt should ever have been cast upon that proposition seems to me strange, for it has certainly been an accepted proposition ever since I have, and I believe, ever since my lord has,

(1) 39 Ch. D. 39. (2) 14 App. Cas. 337.

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been in the profession. There must be fraud in order to found an action of fraud. There are two reasons, I think, why there has been some confusion in the minds of some people with regard to that almost elementary proposition. The first is, the fact that equity judges had to decide questions of law and fact together. An equity judge, when he had to deal with a question of fraud, discussed his reasons for coming to the conclusion that there had been fraud, and it very often happened that an equity judge decided that there was fraud in a case in which gross negligence had been proved. If the case had been tried with a jury the judge would have pointed out to them that gross negligence might amount to evidence of fraud, if it were so gross as to be incompatible with the idea of honesty, but that even gross negligence, in the absence of dishonesty, did not of itself amount to fraud. Cases of gross negligence, in which the Chancery judges decided that there had been fraud, were piled up one upon another, until at last a notion came to be entertained that it was sufficient to prove gross negligence in order to establish fraud. That is not so. In all those cases fraud and dishonesty were the proper ratio decidendi, and gross negligence was only one of the elements which the judge had to consider in making up his mind whether the defendant's conduct had been dishonest. There was, as it seems to me, also a misapprehension, on the part of those who were not so conversant with nisi prius actions at common law as with other branches of the English law, with regard to the direction which was always given to a jury. The direction always given was this: the jury were told that, before they found a verdict against a man who was charged with fraudulent misrepresentation, they must be satisfied either that he had stated what was untrue, knowing that it was untrue, and intending that the untruth should be acted upon, in which case —a wilful lie being a wicked thing—he was necessarily dishonest, or, at any rate, they must be satisfied that, if he did not know that the statement was untrue, he made it deliberately intending that it should be acted upon, and not knowing and not caring whether it was true or false. If a man makes a wilful statement, intending it to be acted upon, and he is reckless whether it is true or false, he has a wicked mind; but his mind

is wicked, not because he is negligent, but because he is dishonest in not caring about the truth of his statement. In the first case, it is the knowledge of the falsehood, in the second, it is the wicked indifference, which constitutes the fraud. There seems to have been some sort of an idea that, when a jury was asked the second question, whether the man had made the representation not knowing and not caring whether his statement was true or false, the expression "not caring" had something to do with his not taking care. But that expression did not mean not taking care to find out whether the statement was true or false; it meant not caring in the man's own heart and conscience whether it was true or false,—and that would be wicked indifference and recklessness. Now in *Derry* v. *Peek* (1) the House of Lords pointed out that, as common law lawyers had always held, an action of deceit must be based upon fraud, and that negligence is not of itself fraud, although negligence in some cases may be of such a kind as to make it highly probable that there has been fraud. Then *Derry* v. *Peek* (1) decided this further point—viz., that in cases like the present (of which *Derry* v. *Peek* (1) was itself an instance) there is no duty enforceable in law to be careful. Negligent misrepresentation does not amount to deceit, and negligent misrepresentation can give rise to a cause of action only if a duty lies upon the defendant not to be negligent, and in that class of cases, of which *Derry* v. *Peek* (1) was one, the House of Lords considered that the circumstances raised no such duty. Is there any such duty in the present case, for deceit is out of the question after the finding of the official referee? If there were no such duty, there can be no breach of duty by negligence. The plaintiffs' counsel have invoked the authority of *Cann* v. *Willson* (2), with the view of persuading us that there is such a duty. I am not now considering whether the law of England might not be stricter than it is; I can imagine a state of law by which a duty would be imposed upon a person under similar circumstances. We, however, have to consider not what the law might be, but what it is. Is there any duty known to the law in such a case as the present? It is said that

(1) 14 App. Cas. 337. (2) 39 Ch. D. 39.

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Heaven v. *Pender* (1), and cases of that class, shew that the defendant had a duty to the plaintiffs. It is idle to refer to cases which were decided under totally different aspects, and upon totally different considerations of the law. Take, for example, the case of an owner of a chattel, such as a horse, a gun, or a carriage, or any other instrument, which is in itself of such a character that, if it be used carelessly, it may injure some third person who is near to it; then it is as plain as daylight that the owner of that chattel, who is responsible for its management, is bound to be careful how he uses it. Exactly in the same way with regard to the owner of premises. If the owner of premises knows that his premises are in a dangerous condition, and that people are coming there to work upon them by his own permission and invitation, of course he must take reasonable care that those premises do not injure those who are coming there. It is because he has the conduct and control of premises which may injure persons whom he knows are going to use them, and who have a right to do so, that he is bound to take care to protect those persons who will thus be brought into connection with him. *Heaven* v. *Pender* (1) was an instance of this class of cases. How has it any application to the present case? Only, I suppose, on the suggestion that a man is responsible for what he states in a certificate to any person to whom he may have reason to suppose that the certificate may be shewn. But the law of England does not go to that extent: it does not consider that what a man writes on paper is like a gun or other dangerous instrument, and, unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly. In *Cann* v. *Willson* (2), owing to a misapprehension of the doctrine of *Heaven* v. *Pender* (1), it was decided that there was such a duty; but when a similar case came before Romer, J., in *Scholes* v. *Brook* (3), that learned judge, whose attention was then directed to the true view of *Derry* v. *Peek* (4), as explained in *Angus* v. *Clifford* (5), said: "Cases have been cited which, it is said, establish such a liability. But apart from

(1) 11 Q. B. D. 503.
(2) 39 Ch. D. 39.
(3) 63 L. T. (N.S.) 837.
(4) 14 App. Cas. 337.
(5) [1891] 2 Ch. 449.

Cann v. *Willson* (1), it appears to me that the authorities may be divided into two classes. One of those classes, is when one person invites another to come upon his premises, in which case the person giving the invitation must use reasonable care to ensure that the condition of the premises does not subject the person invited to danger. Another class is, where a person becomes liable for using or leaving about in such a way as to cause danger, an instrument which is dangerous in itself. Beyond those two classes, I am not aware for the moment of any circumstances under which a person can be held liable in a case such as that which has been argued before me. But the present case falls within neither of those two classes. An invitation to advance money or take shares on a valuation, or on a prospectus, does not, I think, come within the first class, nor can a valuation or a prospectus be considered a dangerous instrument within the meaning of that term as used above by me; and, that being so, I think, that, if the plaintiff had not established a contract, this action must have failed, unless I followed *Cann* v. *Willson* (1); but with reference to that case, after the speeches of the learned lords in *Derry* v. *Peek* (2), I find a difficulty in following it, and I think the case would not have been decided as it was, after the judgment of the House of Lords, which by implication, negatives the existence of any such general rule as laid down in *Cann* v. *Willson*." (1) It is obvious that Romer, J., there put aside the case of *Heaven* v. *Pender* (3) exactly in the same way as my Lord has put it aside, and as I, following him, have endeavoured to do.

I should not have said so much, had it not been for the reappearance to some extent in this case of the old misapprehension of the effect of the decision in *Derry* v. *Peek* (2), for I have myself stated, until I am almost tired of doing so, and I have no doubt that other judges are equally tired at, exactly what *Derry* v. *Peek* (2) did decide and did not decide. I elaborated the same point at great length in *Angus* v. *Clifford* (4), and in *Low* v. *Bouverie*. (5)

(1) 39 Ch. D. 39.
(2) 14 App. Cas. 337.
(3) 11 Q. B. D. 503.
(4) [1891] 2 Ch. 449.
(5) [1891] 3 Ch. 82.

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A. L. SMITH, L.J. We cannot decide this case against the plaintiffs without overruling *Cann* v. *Willson*. (1) In my opinion the defendant is right in saying, as he does in his statement of defence, that he owed no duty to the plaintiffs, unless they could shew, which they cannot, that he entered into a contract with them to give the certificates. It is said that *Heaven* v. *Pender* (2) shews that the defendant owed a duty to the plaintiffs, but that case has, in my judgment, no application to such a case as the present. The decision of *Heaven* v. *Pender* (2) was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other. *Heaven* v. *Pender* (2) goes no further than this, though it is often cited to support all kinds of untenable propositions. That case is a totally different one from the present, and its principle cannot be applied to it. There is no duty in this case arising from the defendant to the plaintiffs, unless by contract, and no contract between the plaintiffs and the defendant has been proved, and, consequently, no breach of duty on the part of the defendant has been established of which the plaintiffs can complain. But it is said that the defendant has negligently made an untrue representation by which the plaintiffs have been injured, and reliance is placed on *Cann* v. *Willson*. (1) That case was decided by Chitty, J., after the decision of the Court of Appeal in *Peek* v. *Derry* (3), and before that decision had been reversed by the House of Lords in *Derry* v. *Peek* (4); and Chitty, J., quoted from the judgment of Cotton, L.J., in *Peek* v. *Derry* (3), in the Court of Appeal, and he based his judgment (1.) on the ground that the defendant owed a duty to the plaintiffs, irrespective of contract, and (2.) on the ground that the defendant had recklessly, though without a fraudulent intention, made a representation which was untrue, with the intention that the plaintiffs should act upon it. In my opinion, the decision in *Cann* v. *Willson* (1) cannot be upheld, and I think that Romer, J., in *Scholes* v. *Brook* (5) was right in so treating it. In my judgment, the

(1) 39 Ch. D. 39.
(2) 11 Q. B. D. 503.
(3) 37 Ch. D. 541.
(4) 14 App. Cas. 337.
(5) 63 L. T. (N.S.) 837.

Divisional Court in the present case took the true view of the law.

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Appeal dismissed.

Solicitors: *Todd, Dennes, & Lamb; Woodcock, Ryland, & Parker, for Ffinch & Chanter, Barnstaple.*

W. L. C.

GEORGE *v.* CARPENTER.

1893 *Feb.* 7.

Fishery Acts—Fishery District—Definition of Limits by Secretary of State's Certificate—"Tributary"—Reservoir—Salmon Fishery Act, 1865 (28 & 29 *Vict. c.* 121)—*Liverpool Corporation Waterworks Act*, 1880 (43 & 44 *Vict. c. cxliii.*).

By 28 & 29 Vict. c. 121, the limits of a river are to be defined, and a fishery district is to be formed, for the purposes of the Salmon Fishery Acts, by a Secretary of State's certificate describing the limits of the river and district, and by s. 3 "river" is to include "such portion of any stream with its tributaries" as may be declared in the certificate. In 1866 the fishery district of the River Severn was formed, and the Secretary of State's certificate defined the limits as being (inter alia) "so much of the River Severn and of the River Vyrnwy and of all other tributaries of the River Severn as is situate within the county of Montgomery"; in 1867 a second certificate further defined the limits as including (inter alia) "so much of the tributaries of the River Vyrnwy" as was in Montgomeryshire, and in 1882 a third certificate included in the district "all tributaries of the River Severn" in that county. In 1880 the corporation of Liverpool obtained an Act of Parliament, and in the exercise of the powers given by such Act constructed a reservoir by means of an embankment across the valley of the Vyrnwy for the purpose of supplying Liverpool with water; the Act authorized them to collect, divert, impound, and use all the waters of the Vyrnwy and all its tributary streams at and above the point at which the embankment of the reservoir crossed the river; but the corporation were, before using the water for their own purposes, to cause to flow and be discharged from the reservoir into the River Vyrnwy within forty chains of the foot of the embankment a regular, equal, constant, and daily supply of water, called the daily compensation water; additional monthly compensation water was also provided for. After the completion of the reservoir, the requirements of the Act as to the compensation water were duly complied with:—

Held, that the reservoir was not a tributary of the River Severn within the meaning of the certificates, and was therefore not within the jurisdiction of the board of conservators of the Severn fishery district.

CASE stated by justices for the county of Montgomery, from which the following facts appeared.

An information had been preferred by the appellant, a water

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bailiff of the Severn fishery board, against the respondent under 28 & 29 Vict. c. 121, s. 35, as amended by 41 & 42 Vict. c. 39, s. 7, charging that he did on July 30, 1892, at Llanwddyn, a place within the Severn fishery district, after a time appointed by law in that behalf, unlawfully fish with a rod and line for trout without a proper licence. (1)

Upon the hearing of the information, it was proved on the part of the appellant (and the justices found as a fact), that by a certificate dated January 18, 1866, under the hand of a Secretary of State, the limits of the fishery district of the River Severn were in part defined as follows: "so much of the River Severn and of the Rivers Vyrnwy and Teme, and of all other tributaries of the said River Severn, as is situate within the county of Montgomery," and it was thereby certified that the Severn fishery district was duly formed. By a further certificate of February 22, 1867, the limits of the Severn fishery district were further defined as including (with other places) "so much of the River Teme and its tributaries, and also the tributaries of the River Vyrnwy as is situate within the county of Montgomery," and by a further certificate of September 20, 1882, as including with other places, "so much of the River Severn and of all the tributaries of the said River Severn as is situate within the county of Montgomery."

By a resolution duly passed on January 7, 1879, the board of conservators of the Severn fishery district determined, by virtue of the powers vested in them by s. 7 of the Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), to issue licences to all persons fishing for trout or char within the district, the duty payable for every rod and line to be one shilling, and notice of this was given by the board by advertisement in the local papers. The

(1) By 28 & 29 Vict. c. 121, s. 35, any person fishing in a fishery district with a rod and line for salmon without a proper licence is made liable to a penalty.

By 41 & 42 Vict. c. 39, which by s. 2 is to be read as one with the Salmon Fishery Acts, 1861 to 1876, the provisions of the Salmon Fishery Acts, 1865 and 1873, with respect to the formation of fishery districts, and to the appointment and powers of conservators, are to extend to all waters "frequented by trout or char." By s. 7, in any fishery district the board of conservators are empowered to issue licences to all persons fishing for trout or char.

licence duty was duly approved by a Secretary of State, and was, on July 30, 1892, in full force throughout the district.

In the year 1880 the corporation of Liverpool were prosecuting a bill in Parliament known as the Liverpool Corporation Waterworks Bill, which was opposed by the conservators; but on June 24, 1880, an agreement was entered into by which the opposition was to be withdrawn on certain terms therein mentioned. The only terms material to the present case are that the corporation was to supply an amount of compensation water to be agreed upon or to be provided by the Act, and to pay for the erection of certain fish passes. The agreement formed part of the case.

By the Liverpool Corporation Waterworks Act, 1880 (43 & 44 Vict. c. cxliii.), s. 8, the corporation was authorized to construct "a reservoir (to be called the Vyrnwy reservoir), to be formed by means of an embankment across the valley of the River Vyrnwy, in the parish of Llanwddyn;" and the reservoir was in due course constructed. By s. 36 of the Act the corporation might from time to time take, collect, divert, impound, and use all the waters of the river Vyrnwy, at and above the point at which the embankment of the Vyrnwy reservoir crossed the same, and of all the tributary streams and springs of the said river above the said point. By s. 37, as full compensation to the Severn Commissioners and other persons and bodies corporate for appropriating the water, the corporation was to cause to flow and be discharged from the Vyrnwy reservoir into the River Vyrnwy, within forty chains from the foot of the embankment, a regular, equal, constant, and continuous daily supply of water called the daily compensation water, and there was further provision for a further supply called the monthly compensation water. The respondent contended that by the operation of s. 37 the right now claimed by the appellant had been extinguished, and that the Severn fishery board were receiving compensation therefor; the daily and monthly compensation water being duly discharged from the reservoir into the River Vyrnwy.

By s. 49 of the same Act it was provided that, except only as was by that Act expressly provided, nothing therein contained should take away, lessen, prejudice, or alter any of the rights,

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powers, authorities, or privileges of the board of conservators of the Severn fisheries; and except as aforesaid all such powers, rights, privileges, and authorities might be exercised and enjoyed by the board in as full and ample a manner as if that Act had not been passed.

On the day mentioned in the information the respondent had fished with a rod and line for trout in the reservoir; he had no licence from the board of conservators of the Severn fishery district. It was proved before the justices that for many years past the River Vyrnwy and its tributaries had been, and that they still were, frequented by trout, and that the Vyrnwy reservoir was also frequented by trout, and that since 1879 licences had been taken out by those fishing the Vyrnwy river and its tributaries, including previous to 1890 those parts which now form part of the Vyrnwy reservoir.

The respondent contended that on the true construction of the statutes and the certificates the reservoir was not a tributary of the River Severn, and that the Liverpool Corporation Waterworks Act, 1880, and the agreement, extinguished any rights which the conservators might formerly have had over such portion of their district as was included in the Waterworks Act.

The justices were of opinion that the agreement of June 24, 1880, and the Waterworks Act, were inconsistent with, and took away the rights of, the fishery board over such portion of their district as was included within that Act, and dismissed the information.

The questions of law for the opinion of the Court were—

(1.) Whether the reservoir was a tributary of the River Severn within the meaning of the certificates.

(2.) Whether the right to issue licences to fish for trout in the reservoir had been extinguished by the agreement of June 24, 1880, and the Liverpool Corporation Waterworks Act, 1880, or either of them.

Willis Bund, for the appellant. The justices were wrong. Prior to 1880 the site of the reservoir was in the Severn fishery district, and persons who fished for trout had to take out licences from the fishery board; there is nothing in the Act of 1880 to

take away the rights of the board to issue such licences, a right which is something wholly apart from a proprietary right in the water. The compensation water provided for by s. 37 was intended as a compensation for taking the water of the river, and not as a compensation for the right to issue licences. By s. 49 of the Act all the rights of the board are preserved, except as in the Act expressly provided, and there is no express provision in the Act for the extinction of this right.

Secondly, the reservoir is a tributary of the Severn within the meaning of the certificates. The certificate of 1882 was granted after the passing of the Act, without any opposition by the corporation, the effect of which was to keep the upper portion of the Vyrnwy, then being turned into a reservoir, in the Severn fishery district. The provision of s. 37 as to the daily compensation water is that it is to flow out of the reservoir itself, and that it is to be a constant and continuous supply; the reservoir is constantly and continuously to feed the river below, and this makes it a tributary. It is true that in *Harbottle* v. *Terry* (1) a reservoir was held not to be a tributary, although the water overflowed from it when it was not being used; but there was there no provision for compensation water, and the overflow was intermittent, while here it is constant and in the nature of the flow of a stream.

Joseph Walton, Q.C. (*W. F. Taylor*, with him), for the respondent. The decision of the justices was right. By s. 36 of the Act of 1880, the whole of the water of the Vyrnwy above the dam is given to the corporation, subject to their sending down the compensation water as required by s. 37, and the effect of what was done under the Act was to put an end to all the tributaries of the Severn lying above the dam; in other words, the Vyrnwy above the dam ceased to exist in any ordinary sense of the word "river," and the reservoir did not become a tributary either of the lower part of the Vyrnwy or the Severn. The fact that the certificate of 1882 was given after the Act is immaterial, for it confines the jurisdiction of the board to "tributaries of the Severn." A tributary must be something in the nature of a stream, as was said by Field, J., in *Harbottle* v. *Terry* (1), and sending down

(1) 10 Q. B. D. 131.

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compensation water from a reservoir cannot make it a tributary as there defined. The principle of that decision is applicable to the present case, and ought to be followed.

Willis Bund, in reply.

LAWRANCE, J. Two questions are asked of us in this case: first, whether the reservoir is a tributary of the Severn within the meaning of the certificates; secondly, whether the right to issue licences to fish for trout in the reservoir has been extinguished by the agreement and the Act of 1880, or either of them. I think that the first should be answered in the negative, and it therefore becomes unnecessary to answer the second.

In my opinion, whatever was the position of this river before the Act (and there is no doubt that it was a tributary of the Severn), the whole of the river below the embankment is still a tributary. But is the water impounded by the embankment, and which the corporation have the power of sending to Liverpool instead of into the Severn, a tributary of that river? It is said that it is, because of the provision that compensation water is to be sent down the Vyrnwy. But *Harbottle* v. *Terry* (1) establishes that the overflow water coming from the reservoir of a waterworks, though flowing down what was a tributary, does not make the reservoir a tributary. There is nothing in the Act of Parliament inconsistent with the view which we take. In my opinion the fishing above the embankment of this reservoir is now quite distinct from the fishing below it, and the first question must be answered in the negative.

COLLINS, J. I am of the same opinion. It is admitted that if this portion of the Vyrnwy is not now a tributary of the Severn, it is not within the jurisdiction of the Severn fishery board, and in view of that admission it is only necessary to answer the first question put to us by the justices, whether this water was a tributary of the Severn within the meaning of the certificates. My opinion has fluctuated a good deal during the argument, and but for the decision in *Harbottle* v. *Terry* (1), I am not certain that I should have come to the conclusion at which I

(1) 10 Q. B. D. 131.

have arrived; but when that decision is fairly looked at I think that it governs this case; it is of course open to distinctions, but independently of those distinctions, I think that a principle may be extracted from it. In that case the Court regarded a reservoir used for commercial purposes as not being a tributary; they thought that a tributary necessarily involved the notion of a stream, and that a reservoir was not of that nature. In the present case, I think that the fact that a regular quantity of compensation water is sent down makes no difference; it is true that there was no such provision for compensation water in *Harbottle* v. *Terry* (1), but in that case the water overflowed from the reservoir when it was not being used, and yet this was held not to make the reservoir a tributary. All the arguments urged in that case apply here, and I am clearly of opinion that this case comes within the principle of *Harbottle* v. *Terry*. (1) On that ground I have come to the conclusion that this reservoir is not a tributary of the Severn, and that it is therefore not within the jurisdiction of the Severn fishery board.

As to the second question, I agree that it becomes unnecessary for us to answer it.

Judgment for the respondent.

Solicitors for appellant: *Stallard & Turner, for John Stallard & Son, Worcester.*

Solicitor for respondent: *Venn, for Town Clerk, Liverpool.*

(1) 10 Q. B. D. 131.

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[IN THE COURT OF APPEAL.]

JOHNSON *v.* DIPROSE.

Bill of Sale—Property in Goods—Seizure—Removal of Goods—Tender of Debt, Costs, and Expenses—Right to redeem—Terms of Redemption—Damages for Injury to Goods in Removal—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 7, *Schedule.*

The grantee of a bill of sale, given by way of security for the payment of money, seized the goods on default by the grantor in payment of an instalment due under the deed. At the expiration of five days from the seizure the grantee began to remove the goods, and the grantor then tendered the amount due for debt, interest, and expenses. The grantee refused to accept the tender, and the grantor brought an action, claiming in trespass for damages for removal of the goods, and for injury to them in the course of removal, and, further, claiming to redeem:—

Held, that the action of trespass would not lie, as at the time of the removal of the goods the property in and the right to possession of the goods were in the grantee, and that the grantor was only entitled to redeem on payment of the debt, interest, and expenses, and the costs arising from the claim to redeem, but was entitled to set off any damages arising from injury done to the goods through the negligence of the grantee in the course of removal.

Appeal by the defendant from a judgment in favour of the plaintiff at the trial before Wright, J., and a jury.

It appeared that the plaintiff had given a bill of sale to the defendant by way of security for an advance of money. The bill of sale was in the form prescribed by the Bills of Sale Act (1878) Amendment Act, 1882, and assigned to the defendant certain household furniture in the plaintiff's dwelling-house in consideration of an advance of money, which was made repayable by equal monthly instalments. The payment of the instalments being in arrear the defendant entered the plaintiff's house and seized the goods, leaving a man in possession. After the expiration of five days from the seizure, the defendant began to remove the goods. The defendant's agent, an auctioneer, was removing the goods, when the plaintiff tendered the sum of 51*l.* 5*s.*, being the unpaid balance of principal, together with interest and expenses. The plaintiff further tendered a sum of 2*l.* 15*s.*, claimed as an auctioneer's levy fee; but the tender was conditional on a separate receipt being given for this latter sum.

The auctioneer declined to give such a receipt, and the goods were removed. The auctioneer's levy fee was a charge in respect of the taking possession of the goods, and included the cost of checking the goods seized with those mentioned in the bill of sale.

The plaintiff brought this action to recover damages for trespass in the wrongful removal of the goods, and for injury to the goods caused through the alleged negligence of the defendant's servants while removing them. In respect of such injury the defendant paid 5*l.* into Court. The plaintiff also claimed in his action the right to redeem the goods on payment of the moneys due under the bill of sale and the expenses.

The learned judge directed the jury, that the question for them was whether the defendant intended by removing the goods after the tender was made to determine the loan and realize his security, and if so he directed them that a trespass had been committed. The jury found for the plaintiff on the question of trespass, with 50*l.* damages; and they also found for the plaintiff in respect of the injury to the goods, with 5*l.* damages beyond the amount paid into Court. The learned judge thereupon gave judgment for the plaintiff for 55*l.* in addition to the amount paid into Court, and also gave judgment for redemption of the goods upon payment of the 51*l.* 5*s.* for principal, interest, and expenses, and 2*l.* 15*s.* the levy fee.

Against this judgment the defendant appealed.

Jelf, *Q.C.*, and *Cababé*, for the defendant. The bill of sale passed the property in the goods to the defendant, and the default of the plaintiff gave him a right to possession. The removal of the goods was therefore justifiable; and the defendant was not bound after the expiration of five days from the seizure to accept a tender, and, further, the tender was not valid because a condition was attached to it.

Herbert Reed, *Q.C.*, and *Pocock*, for the plaintiff. The rights given under the Bills of Sale Act approximate rather to those which exist between pledgor and pledgee than those between mortgagor and mortgagee, and the plaintiff had a right to the goods on making a sufficient tender. The plaintiff undoubtedly could

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have applied for an injunction to restrain the defendant from removing or selling the goods, and that shews that some right to the goods existed in the plaintiff. This is shewn further by the fact that the grantor of a bill of sale can grant another during the currency of the first. [They cited *Jenkins* v. *Jones* (1); *Brighty* v. *Norton* (2); *Toms* v. *Wilson* (3); *Brierly* v. *Kendall*. (4)]

Cababé, in reply.

LORD ESHER, M.R. In this case the plaintiff brought an action against the defendant for an alleged wrongful interference with the plaintiff's goods. The action was in two forms—first, as a common law action for trespass; and, second, to redeem the property under equitable proceedings. The learned judge, who tried the case with a jury, gave judgment for the plaintiff in respect of the claim at common law for the amount of the damages assessed by the jury, which consisted partly of damages in respect of actual injury to the goods by the defendant's servants, and partly of damages for their wrongful seizure—that is, damages arising from the interference with the business of the plaintiff caused by that seizure. As to the redemption of the goods, he has also given judgment for the plaintiff.

The defendant appealed on the ground that the action of trespass would not lie, as the plaintiff had given a bill of sale, in the form prescribed by the Act, which was valid and effectual, and had been duly registered; that the plaintiff made default as to things she should have done under the terms of the bill of sale, and that this gave the defendant a right to seize the goods, and to keep them, and that consequently no action of trespass would lie.

This gives rise to the question, What is the right view of the construction of a bill of sale given in the form contained in the Act? I apprehend that such a bill of sale might have been given before the Act; but the Act, for the protection of persons who borrow money on the security of bills of sale, has provided that a bill of sale given by the grantor by way of security for the payment of money shall be void unless made in accordance

(1) 2 Giff. 99.
(2) 32 L. J. (Q.B.) 38.
(3) 4 B. & S. 442.
(4) 17 Q. B. 937.

with the form in the schedule. A bill of sale is a document given with respect to the transfer of chattels, and is used in cases where possession is not intended to be given. Such a transaction is not a pledge, the conditions of which are entirely different. A bill of sale following the form in the schedule would, but for the proviso, give to the grantee an absolute right to the property in the goods assigned, and also a right to the possession of them; but the proviso incorporates the provisions of s. 7, which must be read into the deed, and which derogate from the full and absolute right of the grantee, not as to the property on the goods, but as to the circumstances under which they may be seized or taken possession of. If any of the conditions in that section enable the grantee to seize the goods, his right to remove or sell them is nevertheless limited, because the section gives the grantor five days in which he may apply to the High Court; and the Court, on its being shewn that the cause of seizure no longer exists, may restrain the removal or seizure, or make such order as may seem just, thus giving the grantor a summary process in lieu of the remedy which the Court of Chancery would have given. If such an application is not made in the five days, the summary remedy is lost; but that does not affect the equitable remedies of the grantor on making good his default. If the grantor pay at the right time, or if at that time he tenders all that he is bound to pay—which is, as between the parties, the equivalent of payment—and if the tender is refused, the grantee in either case commits a trespass in seizing the goods, and is liable to an action of trespass. If, however, the grantor at the right time has neither paid nor tendered, the 7th section comes in, and gives the grantee the right to seize and take possession. The grantor cannot have an action against the grantee because the latter has seized the goods when that seizure is within his rights. The plaintiff in an action of trespass must at the time of the trespass have the present possession of the goods, either actual or constructive, or a legal right to the immediate possession. By the very terms of the bill of sale, the grantor had no such right, and it is admitted that he did not pay or tender the money payable to the grantee within the time limited by the

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Lord Esher, M.R.

Act, and a tender at a subsequent date cannot affect the then existing right of the grantee to hold the goods. The right of the grantee was absolute to take and keep possession, and therefore trespass cannot be maintained: the judgment on this point was wrong.

With regard to the clause to redeem, the plaintiff was in this position—that she could maintain a suit for redemption on the terms of payment of the principal sum and interest, the expenses, and the costs of the redemption suit, except there has been some oppressive action on the part of the grantee which would affect the question of the costs of the suit. If there was a tender of the full amount due, that does not prevent these terms of redemption being applicable, except that it would put an end to the claim for interest. In this case the learned judge has decreed redemption on terms with which in the main we agree, with this rectification, that we think the claim for injury to the goods, which fails with the claim for trespass, might have been allowed in a suit for redemption, as it would seem that the jury found that the injury for which those damages were given was due to negligence. The order as to the redemption of the goods will therefore be varied to the extent that the plaintiff is declared entitled to be credited with 5*l.* beyond the amount paid into Court, or 10*l.* in all. The judge has not given to the defendant the costs connected with the claim for redemption, and to that further extent the judgment must be rectified. As the appeal has succeeded, the plaintiff must pay the costs of the appeal as well as those of the action.

BOWEN, L.J. I am of the same opinion. The first question is whether there is any ground for the suggestion that an action for trespass will lie, or indeed any other action arising at common law. A person who brings an action for trespass to goods must either be in possession of them at the time of the alleged trespass or entitled to the immediate possession. In this case there is no ground for such an action, and there was no other common law right of property which was infringed by the seizure and removal of the goods.

It seems to me the matter becomes clear when one places

before one's mind what a mortgage of chattels is, and what is the effect of a deed under the Act. On a mortgage of chattels the parties may of course make any stipulations; but as an ordinary rule the property passes to the mortgagee, and, that being so, a stipulation is inserted that the right to undisturbed possession till the time of payment shall remain in the mortgagor. When that arrives, if he does not pay, his right to the chattels ceases, and if so he can make no complaint as to any action taken by the mortgagee. The property has passed, and the right to possession has passed, and the only thing that remains to the mortgagor is his right or equity to redeem. If authority were wanting in support of that which seems apparent to the reason, it is to be found in the case of *Maughan* v. *Sharpe*. (1) That is a clear authority that in an ordinary mortgage of chattels to secure an advance of money, when the conditions are not performed, the property in the chattels vests absolutely and indefeasibly in the mortgagee.

That disposes of the general argument for the plaintiff; but, as has been said, the forms of mortgage deeds vary, and it remains to consider what is the effect of the form given by the Act. It purports to assign chattels by way of security, and that passes the property in the goods. Then comes the provision at the end of the form, which transplants into the deed the provisions of s. 7. When the deed is read as incorporating those provisions, the effect is the same as if, in a deed not made under the Act, there had been a clause restraining the possession of the grantee, except in the cases enumerated. The effect is to give the mortgagor a right to the immediate possession of the goods until there is default made in one of the conditions of s. 7. If that right is interfered with by the grantee, he would be liable to an action for trespass, or to an action on the deed, in which the damages would be the same as in the other action, or, in case the deed did not contain the stipulations, an action on the statute, which would have the same effect. What makes these remedies inapplicable in the present case is that the plaintiff has failed to shew that she performed the conditions: she neither paid the money when due, nor tendered it by a tender unclogged by

(1) 17 C. B. (N.S.) 443; 34 L. J. (C.P.) 19.

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Bowen, L.J.

conditions. She was therefore in default, and lost her right to possession, and, her right of property having been transferred, she had nothing left at common law on which she could sue. I should say further, that the validity of her tender does not depend solely on the fact that it was clogged with conditions, for it is indisputable that it was too late.

The plaintiff still had a remedy in equity so long as the goods were in the possession of the grantee. She had a right to redeem; but if it is her own fault that she is driven to that remedy, she can only obtain it subject to the terms ordinarily imposed in such cases. The only question left is as to the damage to the goods. That cannot be recovered at common law; but an Equity Court, for that very reason, would allow an inquiry as to waste, and set off the amount found to be due on that account against the debt, interest, and expenses. It is not a case in which the expense of an inquiry should be incurred, and I think we should accept the finding of the jury as to the damages, and allow them to the plaintiff under the equitable claim. Except in this respect, the defendant has succeeded, and I agree in what the Master of the Rolls has said as to the result of the action and as to the costs.

A. L. SMITH, L.J., concurred.

Appeal allowed.

Solicitor for plaintiff: *John Westcott.*
Solicitor for defendant: *Osborne Charles Kent.*

A. M.

ROBINSON *v.* CALDWELL. 1893 *Feb.* 27.

Practice — Notice of Trial—Reply — Close of Pleadings — Order XXIII., *r.* 1; *Order* XXVII., *r.* 13; *Order* XXXVI., *r.* 11.

Where a plaintiff does not deliver a reply, he cannot give notice of trial until the expiration of twenty-one days after the delivery of the statement of defence.

APPEAL from chambers.

The writ and statement of claim in the action were issued on November 9, 1892. On January 10, 1893, the defendant delivered his statement of defence; and on January 16, the plaintiff, without delivering a reply, gave notice of trial for January 26. The action was set down for trial on January 18.

On February 4, the defendant obtained from a master an order striking out the notice of trial and the entry in pursuance thereof, on the ground that it had been given too soon.

This order was upheld on appeal by Kennedy, J., at chambers.

The plaintiff appealed.

E. U. Bullen, for the plaintiff. By Order XXXVI., r. 11, the plaintiff may give notice of trial, "with the reply (if any) whether it closes the pleadings or not, or at any time after the issues of fact are ready for trial." The plaintiff in this case chose not to deliver a reply, which could only have been a joinder of issue. By Order XXIII., r. 5: "As soon as any party has joined issue upon the preceding pleading of the opposite party . . . . , or has made default as mentioned in Order XXVII., r. 13, the pleadings as between such parties shall be deemed to be closed." By Order XXVII., r. 13, if the plaintiff does not deliver a reply within the period allowed for that purpose, "the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue." The facts, therefore, are put in issue by the default in delivering a reply, and it is immaterial whether the pleadings are closed or not, since by Order XXXVI., r. 15, the trial may be

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entered, notwithstanding that the pleadings are not closed, provided that notice of trial has been given.

T. T. Paine, for the defendant. The order appealed from is right. Notice of trial can only be given either with the reply or after the close of the pleadings. The pleadings may be closed either by a reply joining issue, or, where there is no reply, by the lapse of twenty-one days from the delivery of the defence (Order XXVII., r. 13; Order XXIII., r. 1): notice of trial is not of itself a joinder of issue. Under the Rules of 1875, it was held, in *Metropolitan Inner Circle Ry. Co.* v. *Metropolitan Ry. Co.* (1), that a cause could not be entered for trial before the pleadings were closed, the result being that a good notice of trial delivered with the reply, before the close of the pleadings, might become void through no fault of the plaintiff (Rules of 1875, Order XXXVI., r. 10*a*). To meet that difficulty, Order XXXVI., r. 15, of the present rules allows the trial to be entered notwithstanding that the pleadings are not closed, provided that notice of trial has been given; and, by rule 11, the notice of trial may be given with the reply, whether it closes the pleadings or not. But when there is no reply, the notice of trial cannot be given until the pleadings are closed and the facts put in issue by the operation of Order XXVII., r. 13.

[He also referred to Order XXIII., r. 5, and Order XXXVIII., r. 30.]

LORD COLERIDGE, C.J. I must admit that this matter is not as plain as it ought to be; but I have come to the conclusion that the master and judge at chambers were right. The statement of defence was delivered on January 10; and on January 16 the plaintiff, without delivering a reply, gave notice of trial. It is said that that notice was unauthorized. If authorized, it must have been authorized by the rules, and that drives us to consider the rules in question. The plaintiff relies in effect on Order XXXVI., r. 11: "Notice of trial may be given in any cause or matter by the plaintiff or other party in the position of plaintiff. Such notice may be given with the reply (if any), whether it closes the pleadings or not, or at any time after the

(1) 5 Ex. D. 196.

issues of fact are ready for trial." Now comes the question, When are the issues of fact ready for trial in a case where no reply is delivered? Are the facts in issue when issue is not joined? That sends us to Order XXVII., r. 13: "If the plaintiff does not deliver a reply within the period allowed for that purpose"—that by Order XXIII., r. 1, is twenty-one days after the defence—"the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied, and put in issue." Therefore, unless a reply is delivered within that period, the facts are not put in issue until the expiration of that period. The plaintiff has two courses: he may either deliver a reply, and with it give notice of trial under Order XXXVI., r. 11, or, if he prefers, he need not deliver a reply, and then at the expiration of the twenty-one days the facts will be deemed to be put in issue, and he may give notice of trial. But if he does not deliver a reply, he is driven to the constructive joinder of issue provided by Order XXVII., r. 13, and he cannot give notice of trial until the expiration of the twenty-one days. I am therefore of opinion that this appeal must be dismissed.

HAWKINS, J. I am of the same opinion.

Appeal dismissed.

Solicitor for plaintiff: *W. H. Hudson.*
Solicitor for defendant: *Gordon M. Folkard.*

A. P. P. K.

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Feb. 4.

PENN *v.* ALEXANDER.

Licensing Acts—Offences—Sale during Prohibited Hours—"Bonâ fide Traveller"—Refreshment on Sunday—Licensing Act, 1874 (37 & 38 *Vict. c.* 49), *ss.* 9, 10.

The appellant, a licensed victualler, was convicted of opening his premises for the sale of intoxicating liquors during prohibited hours on Sunday. It appeared that, between 10.44 and 11.20 in the morning, at least 131 persons entered or left the yard of the appellant's premises, all but four or five of them having walked from N., a place from three and a quarter to three and a half miles distant, to the appellant's house. They did not, however, proceed farther, but returned to N. after taking beer and other refreshment. The refreshment was supplied in the yard, where tables and seats were laid out; the tables and seats were not in the yard on week-days, and extra waiters were employed on Sundays to attend to the customers. Each person was asked where he came from and where he slept the preceding night, and no one was supplied with more than one pint of beer, or was served twice; there was nothing disorderly in the conduct of the customers:—

Held, by Lord Coleridge, C.J., Hawkins, Day, and Collins, JJ. (Cave, J., dissenting), that the evidence warranted the finding of the justices that the customers were not bonâ fide travellers, and that the appellant did not truly believe them to be such, and that the conviction was right.

The appellant, a licensed victualler, and the occupier of the White Lion beerhouse at Little Houghton, in the county of Northampton, was convicted by a court of summary jurisdiction under the Licensing Act, 1874, of opening his premises for the sale of intoxicating liquors during prohibited hours on Sunday, April 10, 1892, and was fined 5*l.*, and his licence ordered to be indorsed. The appellant duly appealed to the court of quarter sessions for the county of Northampton against the conviction, when the quarter sessions dismissed the appeal and confirmed the conviction (cancelling, however, the indorsement thereof upon the licence in consequence of the previous good character of the appellant, of which there was no evidence before the Court below) subject to the following case.

On Sunday, April 10, two policemen watched the appellant's premises from 10.44 A.M. to 11.20 A.M., and during that time (thirty-six minutes) they saw eighty-five persons go into the yard of appellant's premises, and seventy-four leave, of whom sixty-six went towards Northampton, and eight went towards

Brafield in the opposite direction. All the eighty-five persons came from the direction of Northampton, and passed the front door of the appellant's premises, which opened upon the highway, and entered the appellant's premises by a gate which opened into a passage leading into the yard situated at the rear of the house, the gate being about thirty-six feet from the back entrance of the appellant's house. The appellant explained that he used to allow Sunday travellers to use the house; but he found that they were then inclined to stay too long, so he only allowed them to use the yard; and further, that when the front door was used for entering the premises on Sundays, the travellers standing about the door used to block up the highway; so he kept this door closed. The gate was not fastened, and neither the appellant nor any one on his behalf stood at or near the gate, but only in the yard itself, to question the persons so entering. All the seventy-four persons left the premises by the gate. The policemen, who were well known to the appellant, then went into the yard, and saw more than fifty-seven men there, of whom some were drinking beer. In the yard itself, tables were spread upon trestles, and provided with forms as seats, and on the tables were several quart and pint jugs, some containing beer. These tables and trestles or forms were not set out in the yard on week-days.

One of the policemen, upon entering the yard, asked the appellant how he accounted for so many persons being there; to which the appellant replied that they were all travellers, and asked them to give their correct names and addresses to the police. Fifty-seven persons of those then in the yard thereupon gave their names and addresses to the police, which were admitted to be correct.

Of the persons, exceeding 131 in number, who were in the appellant's yard, it was proved or admitted that, except four or five persons who had come from Earl's Barton, a village above five miles away, all the persons were artizans from Northampton, a place from three and a quarter to three and a half miles distant, who had walked to the appellant's premises, and not beyond, that morning, and returned or were returning after taking beer and other refreshment. There was no evidence that any of them had stayed in the yard an unreasonable time, or

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had too much to drink, and they all went away in a quiet, peaceable, and orderly manner.

The appellant and his son were called as witnesses, and proved that Little Houghton was a village containing about 500 people, who were all well known to them; many of the 131 persons who were in the yard were known to them as artizans from Northampton. Before any one was served with beer or other refreshment he was asked where he had come from and slept the night before, and no one was allowed to have more than one pint of beer for refreshment, or to be served more than once. The appellant admitted that two waiters more than on a week-day were employed by him on a Sunday to attend to customers.

It was contended for the appellant that he was bound to serve these men with reasonable refreshment, that the men were bonâ fide travellers, and that the law did not require the appellant to inquire into the motive of the men in coming to Little Houghton. It was contended for the respondent that the evidence shewed that these persons were not bonâ fide travellers either for business or pleasure, but merely travellers for the purpose of obtaining intoxicating liquor.

The sessions came to the conclusion that many of the persons had left their homes at Northampton in order to get some beer at Little Houghton, as they could not be served at Northampton, and were of opinion that such persons were not bonâ fide travellers, and were not satisfied that under the circumstances mentioned in the case the appellant truly believed that the said persons were all bonâ fide travellers.

The question for the opinion of the Court was whether, under the circumstances stated in the case, the sessions were right in confirming the conviction and dismissing the appeal.

Poland, Q.C., and *Sills*, for the appellant. The conviction was wrong; the evidence shews these men to have been bonâ fide travellers within the meaning of s. 10 of the Licensing Act, 1874. (1)

(1) 37 & 38 Vict. c. 49. By s. 3, licensed premises outside the metropolitan police district are to be kept closed on Sunday morning until half an hour after noon.

Sect. 9 imposes penalties for the

It is found in the case that the appellant's house is upwards of three miles from Northampton, from which place the men came, and there is nothing to shew that they did not come out for the purpose of taking a walk, or that the refreshment was not reasonably necessary. Under the statutes in force prior to the Licensing Acts, 1872 and 1874 (11 & 12 Vict. c. 49, and 18 & 19 Vict. c. 118), the exception was in favour of "travellers," and it was held that a man might be a traveller, whether he was travelling for business or pleasure: *Atkinson* v. *Sellers* (1); *Taylor* v. *Humphreys* (2); *Taylor* v. *Humphries* (3); *Peplow* v. *Richardson* (4). It is clear from those cases that a person who travels, on foot or otherwise, a reasonable distance on Sunday is entitled to be served.

[LORD COLERIDGE, C.J. In *Taylor* v. *Humphries* (3) it is expressly stated in the judgment that a person who came abroad merely because he desired to go to a public-house and obtain drink would not be a traveller within the exception. In the present case there is a finding that many of the men left their homes in order to obtain beer at Little Houghton.]

That means that they would not have taken their walk in that

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sale of intoxicating liquors during the time at which premises are directed to be closed.

By s. 10: "Nothing in this Act or in the Licensing Act, 1872, contained shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor at any time to bonâ fide travellers. . . .

"If in the course of any proceedings which may be taken against any licensed person for infringing the provisions of this Act or the Licensing Act, 1872, relating to closing, the defendant fails to prove that the purchaser is a bonâ fide traveller, but the justices are satisfied that the defendant truly believed that the purchaser was a bonâ fide traveller, and, further, that the defendant took all reasonable precautions to ascertain whether or not the purchaser was such a traveller, the justices shall dismiss the case as against the defendant. . . .

"A person for the puposes of this Act and the Licensing Act, 1872, shall not be deemed to be a bonâ fide traveller unless the place where he lodged during the preceding night is at least three miles distant from the place where he demands to be supplied with liquor, such distance to be calculated by the nearest public thoroughfare."

(1) 5 C. B. (N.S.) 442; 28 L. J. (M.C.) 12.

(2) 10 C. B. (N.S.) 429; 30 L. J. (M.C.) 242.

(3) 17 C. B. (N.S.) 539; 34 L. J. (M.C.) 1.

(4) Law Rep. 4 C. P. 168.

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direction unless they could have got refreshment at the end of the walk.

Every reasonable precaution was taken by the appellant to ascertain whether these men were bonâ fide travellers: they were asked where they had come from and where they slept, and it is difficult to see what more a publican can do; he cannot inquire into the motives of the persons who resort to his house.

[HAWKINS, J. He cannot bring himself within the exception by shutting his eyes and merely asking where the customers come from.]

The facts do not shew that the appellant was guilty of any laxity. It is essential that there should be a mens rea, and that the publican should intend to serve a person who was not a traveller: see the interlocutory remark of Erle, C.J., in *Taylor* v. *Humphreys*. (1) The number of persons served, which seems to have been the determining fact in the decision of sessions, is but a very small proportion of the population of Northampton: it is less than one in five hundred. [They also cited *Oldham* v. *Sheasby* (2); *Cowap* v. *Atherton*. (3)]

Loyd, Q.C., and *W. A. Attenborough*, for the respondent, were not called upon to argue.

COLLINS, J. I am of opinion that this conviction should be affirmed. We are asked by the court of quarter sessions whether under the circumstances stated in the case they were right in confirming the conviction.

Now the facts are for the justices, and they have found that these men were not bonâ fide travellers, and that they are not satisfied that the appellant truly believed them to be so; in my opinion their finding was perfectly right. The question whether a man is a bonâ fide traveller must be one of fact, depending upon the circumstances of each particular case. It is not sufficient to prove that a man has travelled three miles in order to establish that he is a bonâ fide traveller; the language of the Act of Parliament is too clear to allow of such a contention being successful. What, then, is it which is to determine whether

(1) 30 L. J. (M.C.) at p. 244. (2) 60 L. J. (M.C.) 81; 55 J. P. 214.
(3) Ante, p. 49.

travelling three miles makes a man a bonâ fide traveller? It must be, in my opinion, the purpose with which he undertook the journey. What was the purpose with which these persons undertook the walk from Northampton to Little Houghton? The circumstances are fully set out in the case, and from those circumstances it is clear that their object was to get beer. In all these cases the test must be the object of the journey. If that object is pleasure or business, a man will be a bonâ fide traveller; but if the form of pleasure be to drink beer, he will not be, for the beer, and not the travelling, would be the object of his journey. If that was the object of these persons, the justices were right; and in my opinion the facts set out in the case point clearly to the conclusion that their real object was to get beer. It is suggested that the appellant believed these men to be bonâ fide travellers; and upon this point it is only necessary to say that the belief must be a true belief: he must not only believe that they were bonâ fide travellers, but his belief must be the result of a reasonable inquiry. The evidence shews that the appellant could not have formed such a belief, but that he drew the same inference which I draw, that these men came to his house to get beer, which they could not get in Northampton.

DAY, J. I am of the same opinion, and have nothing to add.

CAVE, J. I have the misfortune to differ from the rest of the Court; but I have not thought it necessary to hear the other side or to take time for consideration, as it is improbable that arguments of counsel would affect an opinion which the arguments of my learned brethren have failed to shake. In my opinion, it would not be safe to allow this conviction to stand, it being one which I think ought never to have taken place. The question is really as to the effect of the evidence on which the conviction was founded. The section of the Licensing Act certainly gives rise to some little doubt: the term "bonâ fide traveller" is not defined, and the language used is calculated to lead to doubt and difficulty. Under the earlier Acts there have been several decisions as to the meaning of "traveller," which has been held to mean a person who journeys for business or pleasure; and

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it is not to be doubted that these men were travellers in that sense. The question is whether they were bonâ fide travellers. I agree with what I understand to be the opinion of the majority of the Court, that the test to be applied is whether these persons went out for the main purpose of getting beer, or whether their main and chief purpose was to take a walk; the getting beer being, if I may use the expression, merely collateral and caused by the walk. I lay no stress on the mere language of the section creating the exception and defining the bonâ fide traveller; a person is not to be deemed to be a bonâ fide traveller unless the place where he lodged on the preceding night is at least three miles distant; it is contemplated in that case that he may be a bonâ fide traveller, but he is not necessarily to be deemed to be one. These men, at any rate, complied with that test: there is nothing therefore in the Act which either prevents their being bonâ fide travellers or which makes them so.

The question we have to decide is one of mixed law and fact; for we have to look at the evidence given before the justices, and to construe a section of an Act of Parliament. In my opinion, if the main object of these men in taking this walk was to get beer which they could not get otherwise, they would not be bonâ fide travellers; but, if they went out for the sake of the exercise and the enjoyment of the country air, sights, and sounds, the fact that in the middle of their walk they had a glass of beer would not prevent their being bonâ fide travellers. Now, what is the evidence in the present case? As it is found by the justices, there was no evidence that they stayed an unreasonable time, or that they had too much to drink, and it is found that they went away quietly and peaceably; if they had stayed too long, or had too much, or had gone away in a disorderly manner, the conclusion of the justices might have been right. What, then, has led them to the conclusion that these men were not bonâ fide travellers, bearing in mind that this is a criminal case, and that it should be determined on satisfactory evidence and not as a matter of guesswork? None of the ordinary evidence that one would expect to find in such a case is to be found here; apparently all that the justices relied upon was that there was a considerable number of these persons, that they stopped at this

small village over three miles from Northampton, and that the large majority did not proceed beyond it. That evidence does not satisfy me that they went mainly to get a pint of beer, and the fact that there was a considerable number of them is not to my mind any evidence of the purpose with which they took their walk. Having regard to the population of Northampton, the fact that there were 131 persons does not strike me as being inconsistent with their being out for the purpose of honestly enjoying a country walk, it being remembered that they walked out in twos and threes and not in a large body. There being, therefore, in my opinion, no evidence that they went out for any other reason than that of taking a country walk, they were bonâ fide travellers, and the conviction was wrong.

But there is another branch of the case which must be considered: a publican is protected if, upon reasonable grounds, he believes a man to be a bonâ fide traveller. It is very important and reasonable that he should have this protection; for a publican is bound to give refreshment to bonâ fide travellers, at the risk of being indicted if he refuses; and he ought not to be convicted, in a case like the present, unless it is clear that the person supplied with refreshment was not a bonâ fide traveller, and that the publican knew or had good reason to believe that he was not. The publican can protect himself, it is said, by asking questions of the people applying for refreshment. This was done in the present case; but it is said that the questions put were evidence of mala fides, and that the appellant could not have believed these men to be bonâ fide travellers. The questions he put were, where they came from and where they slept; from which he discovered that they were artizans of Northampton, and that they had slept upwards of three miles away. It is suggested that he should have asked them what they came to the inn for. But it must be remembered that a publican is generally not a person of very high education or possessing any power of cross-examination; and, if to this question the men had replied that they had left Northampton for a Sunday walk, and had come to the inn for some beer, it would have been difficult to pursue the questioning any farther. And it is difficult to say that he would be bound to disbelieve such an answer, bearing in mind his

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common law liability to serve them unless the statute operated to prevent him. It seems to be admitted by the justices that some of these men may have been bonâ fide travellers, for they only find that "many" of them had come to Little Houghton to get beer which they could not get at Northampton; and of no single man, therefore, can it be said that he left Northampton on purpose to get beer. If the magistrates are uncertain on this vital point, how can the publican know who had left the place in order to get beer, and who in order to have a walk? He is in this difficult position: on the one side he is liable to an indictment if he refuses to serve bonâ fide travellers; on the other he may be fined 5*l.* if he serves men who turn out not to come within that designation. On the facts in this case I can see no reason why the appellant should have believed these men not to be bonâ fide travellers; there was nothing in their first coming or their subsequent behaviour to lead to such a conclusion. As I said before, stress should not be laid on the number of these men; they belonged to a class which as a rule has no opportunity of taking a country walk except on Sunday. It seems to me that there was here no evidence which could properly satisfy the justices that these men were not bonâ fide travellers, and there was nothing to shew that the appellant believed them not to be so, or that he had reason to doubt their bona fides. I do not think that we ought to put a construction upon the statute under which no publican would be safe, and which would press hardly upon the working classes.

HAWKINS, J. I do not propose to deliver a separate judgment concurring as I do in that which is about to be pronounced by my Lord.

LORD COLERIDGE, C.J. We have to deal with a simple question of interpretation of an Act of Parliament wholly apart from any consideration as to whether our decision may press hardly upon any class of the community. Upon the facts of this case I can entertain no doubt that this conviction should be affirmed. The appellant was convicted of contravening ss. 9 and 10 of the Licensing Act, 1874, the latter of which sections is a qualifica-

tion of the former. The only observation that it is necessary to make on the latter section is that it is negative in form; it does not say who is to be, but who is not to be, a bonâ fide traveller; a man is not to be so considered unless the place where he has the refreshment is three miles from the place where he slept; it is not that all who have come three miles are bonâ fide travellers, but no one is unless he has come that distance. Now, Northampton is doubtless a very large place, and just over three miles away is this little village with this beerhouse, which is apparently very well and very respectably conducted. But it is found in the case that constantly on Sundays a large number of persons relatively to the size of Little Houghton came to that village, and if the number of persons so coming may properly be compared with the total population of Northampton, it must be remembered that this is not the only road out of that town. At any rate, the number coming was so large that the appellant, very properly, did not open his front door for fear of the obstruction that would be caused, but laid out a separate place in the yard for these travellers, as to whom it may be said that, if they were bonâ fide travellers and were merely out for a country walk, it is singular that all but four or five of them should have chosen precisely the same termini for that walk. Then many of them were known to be artizans of Northampton and were known to the landlord as such, and it is not unreasonable to suppose that, coming as they did Sunday after Sunday, they came merely to get beer and to go back again. Further, it appears to have been an established practice with the appellant to employ two more waiters on Sunday than on any other day, and that they were employed, not to attend on customers from Little Houghton itself, but specially to attend on such people as came to the house when it was closed to all persons except bonâ fide travellers. The justices had all the circumstances before them, and they came to a clear opinion that a great many of these men were not bonâ fide travellers, and had come out not for the purpose of walking, but of getting beer. There was ample evidence to warrant them in coming to such a conclusion.

It is said that this is a cruel decision; but, with great respect, it seems to me impossible to maintain such a proposition. There

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has been proved to exist in this case a system of going out on Sunday to get beer which cannot be got at home; and it would be idle to shut one's eyes to the fact, with which every one is perfectly familiar, that this is a regularly established system which is believed to be within the law and is at work near every large town. In my opinion it is not within the law. If our decision interferes with the honest and proper recreations of the working man, or any other man, it is for Parliament to alter the law; but that affords no reason for our deciding in opposition to the obvious meaning of the statute; we can only decide upon the Act of Parliament as it stands, and as to that I have not the shadow of a doubt.

Further, in my opinion, this case is concluded by authority: the case of *Taylor* v. *Humphries* (1) seems to be quite conclusive. In his judgment in that case, Erle, C.J., says: "We think that a person would be a traveller within the exception if he came abroad from any of the motives above suggested as legitimate, and by reason thereof needed refreshment; but if he came abroad merely because he desired to go to a public-house and obtain drink, he would not." That decision was founded on a decision of Cockburn, C.J., in *Atkinson* v. *Sellers* (2) to the same effect, and upon the old statutes there are no decisions at all contradictory of these. Two recent cases were cited which were distinguished during the argument, and the decision in *Cowap* v. *Atherton* (3) is obviously not in point. There is thus no authority for the appellant's case, while the respondent's is supported by authority. I concur, therefore, with the majority of my learned brethren that the decision of the justices, supported by that of the quarter sessions, was right, and that this conviction must be affirmed.

Judgment for the respondent.

Solicitors for appellant: *Godden, Son, & Holmes, for Becke & Green, Northampton.*

Solicitor for respondent: *E. E. Hobson, for Rawlins & Son, Market Harborough.*

(1) 17 C. B. (N.S.) 539; 34 L. J. (M.C.) 1.

(2) 5 C. B. (N.S.) 442; 28 L. J. (M.C.) 12.

(3) Ante, p. 49.

W. J. B.

THE QUEEN *v.* KENNEDY.

1893
Jan. 18;
Feb. 8.

Lands Clauses Acts—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 68, 85, 121—*Compensation—Procedure—Notice to Treat—Determination of Amount of Compensation by Justices—Interest greater than a Year at time of Notice to Treat, but less than a Year at time of Requirement of Possession.*

On May 14, 1891, a railway company, empowered by statute to make compulsory purchase of certain lands, served the lessee of part of such lands with notice to treat. At that time the lessee held under a thirty years' lease, which was terminable by the lessor under certain conditions by three months' notice. No further steps were taken by either party under the notice to treat; and on June 30, 1892, the lessor gave the lessee notice to terminate the tenancy at the expiration of three months. On July 20 the railway company required and took possession of the land under s. 85 of the Lands Clauses Consolidation Act, 1845, and took out a summons, to determine the amount of compensation due to the lessee, before a metropolitan magistrate under s. 121 of that Act, which enables justices to determine the amount of compensation when the land required is in the possession of any person "having no greater interest therein than as a tenant for a year or from year to year." The magistrate considered that he had no jurisdiction to entertain the matter on the ground that the value of the interest of the lessee in the land must be considered at the date of the notice to treat, and not at the date at which the land was actually required and taken:—

Held, that since no proceedings had been taken under the notice to treat, the fact that it had been given was immaterial, and that the magistrate had therefore jurisdiction under s. 121 to determine the amount of compensation.

Rule nisi for a mandamus calling upon Mr. Kennedy, the metropolitan police magistrate for Woolwich, to shew cause why he should not hear and determine the question of the amount of compensation to be paid by the Bexley Heath Railway Company to Col. John Thomas North, under s. 121 of the Lands Clauses Consolidation Act, 1845, for the value of his unexpired term or interest in certain lands in the parish of Eltham, Kent, and for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same, by reason of the execution of the works of the said company.

It appeared from the affidavits that the Bexley Heath Railway Company was empowered by Act of Parliament to make compulsory purchase of certain lands in the parish of Eltham. Part of such land was Crown land let by the Crown to Col. North for

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the term of thirty years from October 10, 1886, by a lease dated February 5, 1889. This lease contained a reservation, reserving to the lessor in certain events power, upon giving to the lessee or leaving for him on the demised premises three calendar months' previous notice in writing of the intention so to do, to determine the tenancy of the whole or any part or parts of the demised premises.

On May 14, 1891, the company served Col. North with notice to treat for certain portions of the land occupied by him under this lease; but no further steps were taken under this notice either by the company or by Col. North. On June 30, 1892, the Crown served notice on Col. North under the lease, requiring possession, at the expiration of three calendar months, of those portions of the land.

On July 20, 1892, the company required and took possession of those portions under s. 85 of the Lands Clauses Consolidation Act, 1845, and on October 21 they took out a summons, before the metropolitan police magistrate at Woolwich, to hear and determine the amount of disputed compensation to be paid by them to Col. North under s. 121 of the Lands Clauses Consolidation Act, 1845. The magistrate, however, held that he had no jurisdiction to hear the case, and the railway company applied for and obtained this rule nisi for a mandamus.

The magistrate did not appear to shew cause, but filed an affidavit in which he made the following statement: "At the date of the notice to treat—which, as I understand, determined the time at which the value of the owner's interest is to be considered—no notice on the part of the Crown had been served upon Col. North requiring possession at the end of the three calendar months provided in the lease; and it seemed to me that until such last-mentioned notice was given Col. North's interest under the lease was greater than that of a tenant from year to year, and consequently not within the terms of s. 121 of the Lands Clauses Consolidation Act, 1845." (1)

(1) By the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 121: "If any such lands shall be in the possession of any person having no greater interest therein than as a tenant for a year, or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall

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Lawson Walton, Q.C., and *Forman*, for Col. North, shewed cause against the rule. The magistrate had no jurisdiction. At the time the notice to treat was given, i.e., on May 14, 1891, Col. North had a greater interest in the land in question than as a tenant for a year or from year to year, and the compensation to which he was entitled ought to have been assessed by arbitration or by a jury under s. 68.

[They were stopped.]

Boyle, (*Elliott*, with him), in support of the rule. Under s. 121, the time at which the value of Col. North's interest in the land in question has to be considered is not the date of the notice to treat, but the date at which the company required and took possession of the land, i.e., July 20, 1892. At that time Col. North's interest was less than that of a tenant for a year or from year to year, because the Crown had on June 30 served him with a notice under the lease to determine the tenancy at the expiration of three months. [He referred to *Reg.* v. *Stone* (1), and *Reg.* v. *Great Northern Ry. Co.* (2)]

Lawson Walton, Q.C., in reply. Sect. 121 has no application where a notice to treat has been given under s. 18: *Reg.* v. *Stone* (1). The company have elected to proceed by notice to treat. That notice created the relation of vendor and purchaser between Col. North and the company, and therefore compensation had to be given in respect of Col. North's interest at the date of the service of that notice, a compensation which the magistrate had no jurisdiction to assess: *Tyson* v. *Mayor of London*. (3) Col. North also claims for the damage done to the residue of the land held under this lease, in which he admittedly has a greater interest than as a tenant for a year or from year to year, by severing those portions, and by otherwise

be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same, and the amount of such compensation shall be determined by two justices in case the parties differ about the same."

(1) Law Rep. 1 Q. B. 529.

(2) 2 Q. B. D. 151.

(3) Law Rep. 7 C. P. 18.

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injuriously affecting such residue by reason of the execution of the company's works. The compensation must be assessed once for all, and the magistrate has no jurisdiction to deal with this head of claim.

Cur. adv. vult.

Feb. 8. The judgment of the Court (Lord Coleridge, C.J., and Cave, J.) was delivered by

CAVE, J. This case was argued before my Lord and myself on January 18, and we took time to consider our decision, which I have now to deliver.

It is an application to compel a police magistrate to determine the amount of compensation to which Col. North was entitled under the following circumstances. The point in dispute is whether the question was one which could be heard and determined by a police magistrate, or whether Col. North was entitled to have a jury summoned for the purpose of assessing his compensation. The question whether he is entitled to one or the other depends upon his interest in the property. Now, originally Col. North had a lease for thirty years, which was dated February 5, 1889; and that, of course, gave him a greater interest than as a tenant for a year or from year to year. There was, however, a proviso in the lease reserving to the lessor, the Crown, the right to determine the lease on giving three months' notice in certain events and with certain limitations. On May 14, 1891, the Bexley Heath Railway Company gave Col. North a notice to treat for certain portions of the property comprised in this lease. Nothing further was done under that notice in the way of summoning a jury to assess compensation, and matters remained in that condition. On June 30, 1892, the Crown exercised the power to give notice contained in the lease, and served Col. North with notice to quit in respect of that portion of the land which the railway company had given notice to treat for. The result was, that Col. North's interest in that portion of the land which originally had been an interest for thirty years, less the time he had actually enjoyed it, became an interest for three months only. On July 20, 1892, the railway company gave notice that they required possession of that

portion of land under s. 85 of the Act; and upon that same day they took possession of it, in the manner provided for by that section. Now, that being so, they were bound at once to take proceedings for the purpose of having compensation assessed, and on October 21 they took out a summons before the metropolitan police magistrate at Woolwich to have the amount of compensation determined by him. Col. North appeared, and contended that the magistrate had no jurisdiction, and that he was entitled to have a jury summoned for the purpose of assessing compensation. No doubt, if the proceedings had been taken under the notice to treat and before the Crown notice on June 30, 1892, had been given, the colonel's contention would have been perfectly right. But proceedings were not taken under the notice to treat; they were taken in pursuance of the company's having required and taken possession in July, 1892, under s. 85; and that does undoubtedly raise a point of some nicety, which we thought it advisable to take time to consider. Some cases were cited upon the matter, but none of them have any very strong bearing, and we are driven back to the construction to be placed upon the statute. If the proceedings had been wholly taken under s. 85, it is clear that at the time when possession was taken Col. North's interest in the land in question was an interest for less than a year, and consequently that the magistrate had jurisdiction to assess it. Now, does it affect the case that a previous notice to treat had been given by the company? Upon consideration, we have arrived at the conclusion that it does not. Nothing was done under that notice to treat. The company might have taken proceedings to settle the compensation; Col. North might have compelled them to take proceedings; but neither party acted, both apparently being content that matters should remain in statu quo, and it was not until after the Crown had given the notice to quit that the railway company took proceedings under s. 85. I endeavoured to elicit from the learned counsel for Col. North what his claim was; but he was very reticent upon the subject. The claim had either not been made out, or was not ready for production, and the result was that I could not ascertain what the claim precisely was. I have therefore arrived at the

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conclusion, perhaps not unnaturally under the circumstances, that Col. North has no claim except for the loss of the right to occupy the particular piece of land in question from July 20, 1892, when possession was taken, down to the expiration of his interest, which would be less than three months, and also for the severance occasioned by taking a part of his property during the same period. Now, if that is so, then it is clear that his actual interest is less than a year's interest, and that it comes within the principle of the statute that the compensation in that case should be assessed by a police magistrate, and not by a jury. Under these circumstances, I incline to think that Col. North cannot fall back upon the notice to treat under which nothing was done, but that the compensation must be assessed in the manner provided by s. 121. That being so, although the matter is not as clear as one would wish it to be, we come to the conclusion that the magistrate had jurisdiction, and that he ought to have proceeded to ascertain the compensation.

My Lord authorizes me to say that he agrees in this judgment.

Rule absolute.

Solicitors for applicants: *Dollman & Pritchard.*
Solicitor for respondent: *G. Whale.*

A. P. P. K.

DRIVER *v.* BROAD. 1893

Frauds, Statute of—Contract for Interest in Land—Debentures—Company—Assignment. *Feb.* 18, 27.

A company incorporated under The Companies Act, 1862, issued debentures charging its undertaking and all its property, both present and future. The debentures contained the following conditions: that the charges thereby created should be a floating security, and that the company, until the appointment of a receiver or the commencement of a winding-up, should be at liberty in the course of its business to dispose of the property charged; that, in the event of the company making default in payment of the principal or interest secured by the debentures, or in the event of the winding-up of the company, the debenture-holders might appoint a receiver, and that such receiver should have power to sell the mortgaged property. A holder of certain of such debentures orally contracted for the sale and transfer of them to a purchaser. At the date of such contract the company was possessed of certain leasehold property:—

Held, by Mathew, J., that the contract for the sale of the debentures was a contract for an interest in land within the fourth section of the Statute of Frauds.

FURTHER CONSIDERATION before Mathew, J.

A company registered under The Companies Act, 1862, and called The Broad's Patent Night Light Company, Limited, in March, 1890, issued certain mortgage debentures, whereby it charged with the payment of the principal money and interest therein contracted to be paid, "its undertaking and all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being." The debentures were issued subject to conditions indorsed thereon and of which the material portions were as follows:—

"1. The charge hereby created shall be a floating security, and accordingly the company, until the appointment of a receiver under the provisions herein contained, or the commencement of a winding-up, shall be at liberty, but only in the ordinary course of its business, to sell, deal with, and dispose of the property charged, and to give receipts for money, and divide its profits, as if none of the said debentures had been issued."

"14. The following provisions as to the appointment and powers of a receiver shall have effect, that is to say:—

"(1.) The registered holders of one-half in value of the

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outstanding debentures of this issue may, by writing, appoint some person approved by them or him to be receiver, or a receiver and manager, of the property charged by the debentures, and such appointment may be made when the company has made default for more than two calendar months in the payment of any principal moneys or interest hereby secured, or when any order has been made, or effective resolution has been passed, for the winding-up of the company, and section 24 of the Conveyancing Act, 1881, shall be regarded as modified accordingly.

"(2.) The receiver shall have power to sell the mortgaged property, and the provisions of the said Act as to sales by a mortgagee shall be applicable."

In December, 1891, the plaintiff being the holder of twenty of the above-mentioned debentures entered into an oral contract with the defendant for the sale and transfer of such debentures to him at an agreed price.

At the dates, both of the issue of the debentures and of the contract of sale of them to the defendant, the company was possessed of certain leasehold property, consisting of a factory and warehouses where its business was carried on. The defendant subsequently refused to accept the transfer of the debentures or to pay the price. To an action for the breach of such contract the defendant pleaded that the contract was a contract for an interest in land within s. 4 of the Statute of Frauds and ought to have been in writing.

Reid, Q.C., and *Morten*, for the plaintiff. These debentures did not give to the holders an interest in land, and a verbal agreement of transfer was consequently valid. The charge created by such debentures as these is by way of floating security, and only attaches finally to the property of the company on the appointment of a receiver or upon a winding-up: see Palmer's Company Precedents, 5th ed. p. 476. In *Walker* v. *Milne* (1) dock and canal shares, and bonds of a canal company secured by an assignment of the rates, were held not to be an interest in land

(1) 11 Beav. 507.

within the Statute of Mortmain. And in *Myers* v. *Perigal* (1) the same was held of shares in a joint stock bank, the assets of which were by its deed to be deemed to be personal estate, and which consisted of freehold and copyhold estates and money due upon mortgage of real estate. Lord St. Leonards there said that the test whether a share is an interest in land is whether the holder could enter upon the land or claim any portion of it for his private purposes. In *Entwistle* v. *Davis* (2) Page Wood, V.C., gave the same reason for holding that shares in a land company were not within that Act, namely, that the right of the shareholder is "merely a right to call for his share of the profits, and not for a specific part of the land itself." But if shares in a company which owns land are not interests in land, then neither are debentures of such a company: both must stand on the same footing. In *Holdsworth* v. *Davenport* (3) a debenture of a waterworks company in the form provided by Sched. C to the Companies Clauses Act, 1845, by which the undertaking, including the town rates, was charged with the repayment of the sum advanced, was held not to be within the Mortmain Act. In that case, Malins, V.C., refused to draw any distinction in this respect between shares and debentures, being of opinion that a debenture amounted to nothing more than an assignment of shares. And in *Attree* v. *Hawe* (4) the Court of Appeal took the same view of debentures of a railway company. In Lindley on Company Law, 5th ed., p. 451, note, it is stated broadly without qualification that "debentures are not an interest in land;" the author evidently did not intend to limit his proposition to debentures of companies incorporated under special Acts. Here it is clear that the debentures create no immediate charge upon the land, for the company are expressly authorised to sell the land free from incumbrances at any time prior to the appointment of a receiver. But if the mere fact that such a debenture may, in the event of a receiver being appointed, become a charge on the land, makes it an interest in land ab initio, then any simple contract debt must equally be an interest in land, for it has the potentiality of becoming a judgment debt, and, upon delivery of

(1) 2 D. M. & G. 599.
(2) Law Rep. 4 Eq. 272.
(3) 3 Ch. D. 185.
(4) 9 Ch. D. 337, 348.

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a writ of elegit to the sheriff, of becoming a charge upon the land of the debtor.

A. T. Lawrence, and *J. G. Wood*, for the defendant. Debentures in this form constitute a charge on all the property of the company for the time being. It is no doubt a charge by way of floating security, and the company has power to sell the property charged, for otherwise the company would not be able to carry on its business. But that power of sale does not prevent the charge from attaching. It attaches to all the property of the company as soon as acquired, and continues so to attach until the property is disposed of in the ordinary course of business. If the property is disposed of otherwise than in the ordinary course of business the charge does not cease to attach. The fact that the debenture-holder is not to realise his security until default does not prevent the debenture from being a charge on the property, otherwise the so-called security would be nothing more than a mere bond.

The cases which have been relied on by the plaintiff are not in point, they either relate to shares, or else to debentures in the particular form given in Sched. C to the Companies Clauses Act. No doubt ever since *Myers* v. *Perigal* (1) it has been treated as settled law that shares in a joint stock company which happens to have land as part of the assets of its business are to be regarded as pure personalty; for the ownership of the business property is in the company as distinguished from the shareholders. But debentures stand on a different ground. The decision of Malins, V.C., in *Holdsworth* v. *Davenport* (2), that the debentures with which he was there dealing did not create an interest in land was undoubtedly correct, but not on the ground that there is no distinction between shares and debentures generally; it is to be supported only on the ground that those particular debentures were issued in the form given in Sched. C of the Companies Clauses Act. Debentures in that form are expressed to charge the "undertaking," which is defined by both the Companies Clauses and Lands Clauses Acts to be the "undertaking or works by the special Act authorized to be executed," and was in *Gardner* v. *London, Chatham, and Dover*

(1) 2 D. M. & G. 599. (2) 3 Ch. D. 185.

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Ry. Co. (1) interpreted to mean the going concern created by the Act, a concern which could not be broken up or interfered with by the mortgagees. It was on the ground that the debentures there dwelt with were in that particular form that the decision in *Attree* v. *Hawe* (2) proceeded. In the present case the debentures mortgage not only the undertaking, but also the property of the company. A receiver appointed by the mortgagees of an undertaking as defined in the above-mentioned Acts is a mere cashier, who cannot appoint or dismiss any servant of the undertakers, nor enter upon their land, whereas the receiver appointed by the debenture-holders in the present case is expressly empowered to enter upon the land of the company and sell it. In *In re David* (3), where harbour trustees borrowed money on the security of bonds by each of which they assigned to the mortgagee such proportion of the tolls paid by the public for the right of passing over the land of the trustees as the amount of the debenture bore to the whole money borrowed, it was held by the Court of Appeal that such bonds created an interest in land within the Mortmain Act. That case is directly in point.

Morten, in reply. The debentures in question had no further effect than that of giving the holders priority over the other creditors of the company.

Cur. adv. vult.

Feb. 27. MATHEW, J. This was an action brought to recover damages for breach of a contract to purchase from the plaintiff certain debentures of a joint stock company called The Broad's Patent Night Light Company. The ground of defence was that the contract for the sale and purchase of these debentures was a contract in respect of an interest in land within the fourth section of the Statute of Frauds, and consequently ought to have been in writing. In order to determine whether the debentures charged the real property of the company, and so created an interest in land within that statute, it is necessary to examine their terms and conditions. Now they are expressed to charge the undertaking of the company and all its property present

(1) Law Rep. 2 Ch. 201. (2) 9 Ch. D. 337, 348.
(3) 43 Ch. D. 27.

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and future, and they do so, subject to the following conditions amongst others; that the charge thereby created shall be a floating security, and that the company until the appointment of a receiver or the commencement of a winding-up, shall be at liberty in the ordinary course of its business to dispose of the property charged; but that on the company making default in payment of the principal or interest thereby secured, the debenture-holders may appoint a receiver who shall be at liberty to sell the mortgaged property. It was admitted that the company had property in land. Looking at the terms of these debentures, I think it is beyond question that they constitute a charge on that property. If authority is needed, the cases of *Toppin* v. *Lomas* (1) and *In re David* (2) seem to me directly to support that conclusion. In the former case, certain local improvement commissioners, having power to raise money on mortgage of their lands, issued certain bonds, for the securing the performance of the conditions of which bonds they executed an indenture of mortgage of their lands of even date to trustees, and it was held that the bonds so secured created an interest in land within s. 4 of the Statute of Frauds. In the latter case, where harbour trustees incorporated by special Act, issued debentures, whereby they mortgaged specific portions of the tolls which they were empowered by their special Act to levy from persons passing over bridges on their land, the debentures were held to create an interest in land within the meaning of the Mortmain Act. But if instruments, so remotely connected with the land as were the bonds in that case, are to be regarded as constituting a charge upon land, à fortiori must the debentures in the present case.

A number of cases decided under the Mortmain Act were cited on behalf of the plaintiff. But the authorities referred to do not appear to me to be in point, and for the reasons given by the defendant's counsel; that in those cases either the interest in the companies with which the Court was dealing consisted of shares, and a shareholder's position in regard to the real assets of the company is wholly different from that of a debenture-holder, or else, in those in which the interest consisted of debentures,

(1) 16 C. B. 145. (2) 43 Ch. D. 27.

such debentures purported to charge only the profits or earnings of the undertaking, and not as here to mortgage the property of the company with power to the mortgagee on the mortgagors' default to sell the estate. Judgment must therefore be given for the defendant.

Judgment for defendant.

Solicitor for the plaintiff: *J. White.*

Solicitors for the defendant: *Faithfull & Owen.*

J. F. C.

[IN THE COURT OF APPEAL.]

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MACALPINE & CO. *v.* CALDER & CO.

Practice—Reference of Matters in dispute in Action—Inspection of Property, subject of the Action, jurisdiction to Order—Concurrent jurisdiction of Judge and Referee—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *ss.* 14, 15 —*Order* XXXVI., *r.* 50; *Order* L., *r.* 3.

Where all matters in dispute in an action are referred to a referee or arbitrator under the Arbitration Act, 1889, s. 14, the Court or a judge still has jurisdiction to make an order for inspection of property, the subject of the action; but the referee or arbitrator likewise has jurisdiction to make such an order; and, *semble*, ordinarily the more convenient course is, that application for such an order should be made to him in the first instance, and not to a judge at chambers.

APPEAL from the order of a Divisional Court (Day and Collins, JJ.), setting aside an order of Bruce, J., at chambers, which directed that the plaintiffs should be at liberty to inspect certain works upon the premises of the defendants, which were the subject-matter of the action.

The facts were as follows. The action was for the price of labour and materials supplied in respect of work done to premises belonging to the defendants. The defendants, in their statement of defence, pleaded payment into Court as to part of the claim, and, as to the residue, denied the doing of the work as alleged, and asserted that the amounts charged were unreasonable. A summons for directions having been taken out, an order was made thereon at chambers, that (amongst other things) the action should be referred for trial to an official

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referee, unless within fourteen days the parties agreed upon a special referee. The parties subsequently agreed that the case should be referred to a barrister, and on January 3, an order of reference was drawn up in accordance with Form 24, Appendix K, to Rules of Supreme Court, 1883, whereby all matters in dispute in the action were referred to his award.

On January 4, the plaintiffs took out a summons at chambers under Order L., r. 3, for an order for the inspection by the plaintiffs, their solicitors, agents, and witnesses, of the works in question upon the defendants' premises. The judge at chambers, on the hearing of the summons, made the order applied for. On appeal to the Divisional Court they reversed his decision on the ground that the matters in dispute had been referred to the award of an arbitrator according to the old common law practice, and the judge had no jurisdiction to make the order. (1)

(1) By the Arbitration Act, s. 14: "In any cause or matter (other than a criminal proceeding by the Crown), (*a*) if all the parties interested, who are not under disability, consent; or (*b*) if the cause or matter requires any prolonged examination of documents, or any scientific or local investigation, which cannot, in the opinion of the Court or a judge, conveniently be made before a jury or conducted by the Court through its other ordinary officers; or (*c*) if the question in dispute consists wholly or in part of matters of account, the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the Court."

By s. 15: "(1.) In all cases of reference to an official or special referee or arbitrator under an order of the Court or a judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner as may be prescribed by rules of Court, and subject thereto as the Court or a judge may direct."

By Order XXXVI., r. 50: "Subject to any such order as last aforesaid, the referee shall have the same authority with respect to discovery and production of documents, and in the conduct of any reference or trial, and the same power to direct that judgment be entered for any or either party, as a judge of the High Court."

By Order XXXVI., r. 55 (*c*): "The provisions of rules 48 to 55, of Order XXXVI., and of r. 55 (*b*), shall apply, where any cause or matter, or any question or issue of fact therein, is referred to an officer of the Court, or to a special referee or arbitrator. Provided that, where the arbitrator is appointed otherwise than by an order of the Court, the provisions of r. 48, as to sitting de die in diem shall not apply." (Rules of Supreme Court, Dec. 1889, r. 5.)

W. O. Hodges, for the plaintiffs. The judge at chambers had jurisdiction to make the order. This reference was under s. 14 of the Arbitration Act, 1889. A referee under that section is by s. 15 placed in the position of an officer of the Court, and it is obvious, having regard to the terms of s. 15, that the jurisdiction of the Court as to interlocutory matters arising in the action continues after the order of reference. The arbitrator would not have power to order the preliminary inspection of the premises required by the plaintiffs in order to get up their case. The provisions of the Arbitration Act, 1889, Sched. I. (f) only refer to matters arising during the reference itself, not to such matters as inspection before the trial or hearing; and, moreover, they are not applicable to references of an action by order of the Court under s. 14, but only to common law references by consent, which are within the first part of the Act. The case of *Darlington Waggon Co.* v. *Harding* (1) does not shew that this was not a reference under s. 14 of the Arbitration Act, 1889, because in that case the reference was not of all matters in dispute in the action only, but of all matters in difference. He cited also on the question of jurisdiction to make the order for inspection: *Dauvillier* v. *Myers* (2); *Rowcliffe* v. *Leigh* (3); *Edwards* v. *Edwards*. (4)

Assuming that there was concurrent jurisdiction in the judge and in the referee to make this order for inspection, there seems to be no reason why the application should not be made to the judge. Before the reference has commenced, the arbitrator knows nothing of the matters in dispute. It is at any rate a matter for the discretion of the judge whether he will make the order, and his exercise of that discretion ought not to be interfered with unless the Court can see clearly that it was wrong.

Hammond Chambers, for the defendants. It is submitted that this was not a reference under the Arbitration Act, 1889. This case was not referred for report under s. 13, or for trial under s. 14. This reference was a reference by consent to the award of the arbitrator, according to the old common law practice.

(1) [1891] 1 Q. B. 245.
(2) 17 Ch. D. 346.
(3) 4 Ch. D. 661.
(4) 28 L. J. (N.S.) (C.P.) 25.

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Consequently, the Court had no longer any jurisdiction to make an order for inspection, as in an action still pending in the High Court: *Penrice* v. *Williams.* (1)

[BOWEN, L.J. In that case the reference was of the action and all matters in difference.]

That circumstance does not appear to be the ground of the judgment. The principle of the case seems to be that, where the matter is by consent of the parties withdrawn from the ordinary course of law and referred to the award of an arbitrator, the jurisdiction of the Court over the proceedings is at an end.

Secondly, assuming that the reference was under s. 14 of the Arbitration Act, and the judge therefore had jurisdiction by reason of the provisions of s. 15, it is submitted that it would only be by way of setting right the referee as an officer of the Court when he had gone wrong; and the proper course in such a case is to apply for inspection to the referee, in the first instance at any rate. If the special referee is to be treated as being substituted for an official referee under s. 14, he has power to deal with such matters under Order XXXVI., r. 50. See *Hayward* v. *Mutual Reserve Association.* (2) It is the well-known practice in references to have a preliminary meeting before the arbitrator, at which he gives such directions as he thinks necessary as to such matters as inspection, production of documents, &c. It is obvious that it is much more convenient when the case has been referred that the referee should deal with the whole case, including such matters as these, than that there should be a number of interlocutory applications of this kind at chambers. It was stated to be so in *Barnett* v. *Aldridge Colliery Co.* (3)

W. O. Hodges, in reply. This was not a reference by consent in the proper sense of the term. The parties consented to the reference being to a special referee; but there was a previous order that, if they did not agree on a special referee, the case should be referred for trial to an official referee. This was clearly intended to be a reference under s. 14 of the Arbitration Act.

It is submitted that Order XXXVI., r. 50, does not apply to such a matter as this, which is expressly reserved to the judge at

(1) 23 Ch. D. 353. (2) [1891] 2 Q. B. 236.
(3) 4 Times L. R. 16.

chambers under Order LIV., r. 12; but only to matters arising in the course of the conduct of the reference or trial itself.

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LINDLEY, L.J. I think that the order of the Divisional Court was right, though not altogether on the same grounds as stated by them. In this case the plaintiffs had done some work upon the defendants' property, for the price of which the action was brought. A summons was taken out for directions; and an order was made directing, amongst other things, that the action should be tried by the official referee, unless the parties within fourteen days agreed upon a special referee. The parties did agree upon a special referee, and accordingly an order was made by which it was ordered that all matters in dispute in the action should be referred to such referee. The Court below seems to have assumed that this was a reference by consent of all matters in difference, according to the old common law practice; but the order of reference now appears to have been intended to be made under s. 14 of the Arbitration Act, 1889. Assuming it to have been so made, I think there is no doubt that the judge at chambers had jurisdiction to make an order for inspection of property the subject-matter of the action; for in that case the position of the arbitrator is defined by s. 15 as being that of an officer of the Court, and it seems impossible to say that the Court would not have jurisdiction in respect of matters arising in relation to a reference of an action pending before its own officer. But then it seems to me equally clear, that under Order XXXVI., r. 50, the referee or arbitrator has likewise ample power to make such an order for inspection. There would in such case be concurrent jurisdiction in the judge at chambers and the referee. That being so, it would, as was said in the case of *Barnett* v. *Aldridge Colliery Co.* (1), primâ facie appear to be the more convenient course that the application for inspection should in the first instance be made to the referee or arbitrator. I do not understand why the plaintiffs in this case were in such a hurry to apply at chambers for an order for inspection. If they had waited a little while, they could have applied to the arbitrator, who would have decided whether such an inspection was necessary. The very day after the order of reference is obtained they

(1) 4 Times L. R. 16.

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give notice of this application at chambers, the necessity for which I do not see. I do not think that under the circumstances the plaintiffs ought to have adopted that course. Nevertheless, I should be very unwilling to interfere with the decision of the judge at chambers in a matter in which he had jurisdiction, if I thought that he had considered the question whether, under the circumstances of the case, it was right that he should make the order. But I am convinced that his attention was not directed to this question at all, but only to the question of jurisdiction. His mind seems to have been wholly diverted from the question, whether, as a matter of convenience, the application should have been to the arbitrator. Upon appeal to the Divisional Court, they reversed his order. It appears to me that their decision, in the result, was right, not because he had no jurisdiction to make the order, but because, under the circumstances, the order ought never to have been asked for or made. For these reasons I think that the appeal should be dismissed.

BOWEN, L.J. I agree so thoroughly with what my brother Lindley has said with regard to the law of the matter, and the position of the parties to the reference, that I will add nothing to his observations, except to say that I agree with the view expressed by Wills, J., in the case of *Hayward* v. *Mutual Reserve Association* (1), which seems entirely in accordance with what my brother Lindley has said; and, further to say that, if it were necessary to consider the case of *Dauvillier* v. *Myers* (2), I should require time to consider whether I could agree with that decision; because the late Master of the Rolls appears, in that case, to have assumed that a judge of the High Court has no power to make an order for production of documents at the trial, whereas such a power has constantly been exercised by common law judges. With regard also to the merits of this case, so far as the question of discretion is concerned, I entirely agree with my brother Lindley.

Appeal dismissed.

Solicitors for plaintiffs: *Irvine, Hodges, & Borrowman.*
Solicitor for defendants: *P. Thornton.*

(1) [1891] 2 Q. B. 236. (2) 17 Ch. D. 346.

E. I.

[IN THE COURT OF APPEAL.]

C. A.
1893
Feb. 28;
March 9.

HOLMES *v.* MILLAGE.

Practice—Execution—Receiver, Appointment of—Equitable Execution—Future Earnings of Judgment Debtor—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25. *sub-s.* 8.

The Court has not jurisdiction to enforce satisfaction of a judgment debt by appointing a receiver of the future earnings of the judgment debtor.

The Court cannot grant "equitable execution" by the appointment of a receiver in a case where prior to the Judicature Acts no Court could grant such relief.

APPEAL from the order of a Divisional Court (Day and Collins, JJ.) for the appointment of a receiver.

The facts were as follows: The plaintiff had obtained judgment against the defendant in an action for money lent for the sum of 500*l.* and costs. The defendant had no assets in this country, and was residing in Paris. He acted as the correspondent there of the *Daily Chronicle*, and was in receipt of a salary of 8*l.* 8*s.* per week from the proprietors of that newspaper, which was paid him weekly through bankers at Paris. The judgment being unsatisfied, the plaintiff applied at chambers for the appointment of a receiver of the defendant's salary by way of equitable execution. The judge at chambers dismissed the application. The plaintiff appealed to the Divisional Court, who granted an order appointing a receiver "to receive the moneys receivable in respect of the following property, that is to say, all sums due and payable, or to become due and payable, to the defendant by the proprietors of the *Daily Chronicle* newspaper." The order provided in the usual way that the appointment of the receiver should be without prejudice to the rights of any prior incumbrancers upon the said premises who might think proper to take possession of or receive the same by virtue of their respective securities, or, if any prior incumbrancer was in possession, then without prejudice to such possession; and directed that the proprietors of the *Daily Chronicle* should pay all sums due and payable, or to become due and payable to the defendant, to such receiver, and that the receiver should have liberty, if he should

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think proper, but not otherwise, to keep down the interest upon any prior incumbrances according to their priorities, and should be allowed such payments, if any, in his accounts; and it provided for the passing of accounts by the receiver and payment by him of the balances appearing due on such accounts towards satisfaction of what should be from time to time due in respect of the plaintiff's judgment. The defendant stated on affidavit that the salary paid him by the proprietors of the *Daily Chronicle* was his sole means, and that he had a wife and family to support.

H. A. Forman, for the defendant. The appointment of a receiver in such a case as this is quite unprecedented. All the cases in which receivers have been appointed by way of equitable execution under s. 25, sub-s. 8, of the Judicature Act, 1873, are cases where there has been something in the nature of property to receive. But there is no precedent for such an appointment in relation to future earnings, in order to earn which substantial personal services are necessary. It was pointed out in *Manchester and Liverpool District Banking Co.* v. *Parkinson* (1) that in the case of profits of a business an order appointing a receiver is useless, unless he is also appointed manager. In this case the services on which the earnings depend cannot be performed by a deputy. The Court will not make an order which would be futile. They cannot compel the defendant to act as foreign correspondent to the *Daily Chronicle* in order to pay the judgment debt, or compel the proprietors of the newspaper to employ him. The defendant's engagement is his only means of subsistence, and the effect of the order that his salary shall be receivable by a receiver must be to prevent his earning it in future. Such an order could not have been made by the Court of Chancery before the Judicature Act; and it is submitted that there is nothing in that Act to authorize such an order. Sect. 25, sub-s. 8, of the Judicature Act, 1873, gives power to make an order for a receiver where the Court thinks it "just or convenient" to do so. It was never intended by those words to extend the power of appointing a receiver previously exercised

(1) 22 Q. B. D. 173.

by the Court of Chancery to such a case as this. It has been held that the future salary of a medical officer of health cannot be attached by a garnishee order: *Hall* v. *Pritchett.* (1) [He also cited *In re Mirams* (2); *Hamilton* v. *Brogden.* (3)]

Philbrick, Q.C., and *Arnold Herbert*, for the plaintiff. It is submitted that whatever may be the subject of an assignment can now be reached by way of equitable execution through the appointment of a receiver. *Tailby* v. *Official Receiver* (4) shews that there may be an assignment of future earnings, such as the defendant's salary. The Court has power, under the Judicature Act, 1873, s. 25, sub-s. 8, to appoint a receiver where they think it "just or convenient." It is certainly just that the defendant should be compelled to satisfy his debt; and it is convenient, for the difficulties suggested are only theoretical. It is not to be supposed that the defendant will throw up the appointment which constitutes his only means of subsistence, or on the other hand that the plaintiff would destroy the source from which she hopes to get her money by insisting on the whole of the salary being received by the receiver. Legally, each weekly payment would be subject to attachment by garnishee order when due, though practically it is impossible to attach it before it is paid. That being so, the Court will assist the plaintiff by appointing a receiver. If the order is left standing, the practical effect will be that the judgment debt, or at any rate a portion of it, will be paid.

[They cited *In re Shine* (5); *Ex parte Benwell.* (6)]

Forman, in reply, cited *Salt* v. *Cooper.* (7)

Cur. adv. vult.

March 9. The judgment of the Court (Lindley and Bowen, L.JJ.) was delivered by—

LINDLEY, L.J. This is an appeal from an order appointing a receiver of moneys to become payable to the defendant by third parties in consideration of services to be performed by him for them.

(1) 3 Q. B. D. 215.
(2) [1891] 1 Q. B. 594.
(3) W. N. (1891) p. 36.
(4) 13 App. Cas. 523.
(5) [1892] 1 Q. B. 522.
(6) 14 Q. B. D. 301.
(7) 16 Ch. D. 544.

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The action is for money lent, and on June 4, 1889, the plaintiff recovered judgment against the defendant for 500*l.* and costs. The defendant has no assets in this country. He lives in Paris. He is the foreign correspondent of a London daily morning newspaper, and under an agreement between him and the proprietors of the newspaper he receives from them weekly a sum of 8*l.* 8*s.*, which is paid to him through a Paris banker.

The plaintiff, being unable to obtain payment of her judgment debt, first applied for a garnishee order; but, as no weekly payments were in arrear, no order could be made. It is plain that the defendant's earnings cannot be reached by that process. The plaintiff then applied by summons in chambers for the appointment of a receiver, by way of equitable execution, of all sums due and payable, or to become due and payable, to the defendant by the proprietors of the newspaper. The only party to whom the summons was addressed was the defendant. The proprietors of the newspaper were not parties to it. The judge at chambers dismissed the application with costs. The plaintiff appealed to the Divisional Court, and that Court reversed the order made in chambers, and appointed a receiver in the following terms. [The Lord Justice here read the order.] The present appeal is from this order.

The question raised by the appeal is one of great importance, not only to the parties immediately concerned, but to every wage-earning person in the country. The question involved in the appeal is whether a judgment creditor is entitled to a receiver of the future earnings of his judgment debtor.

Going back to the time before the Judicature Acts, it is clear that a judgment creditor had no such right. The common law writs of execution did not extend to future income. The garnishee process did not reach it; nor was the statutory process of charging orders applicable to wages or other remuneration for personal services. The Courts of common law had no jurisdiction to appoint a receiver. The Court of Chancery no doubt had; but the jurisdiction was confined to certain classes of cases within which such a case as the present cannot be brought. In considering the jurisdiction of the Court of Chancery to appoint a receiver, we may dismiss from our minds all cases in which the

Court interfered to enforce its own decrees against property, the subject-matter of a suit in equity. We have nothing to do here with a suit to enforce a charge created by the debtor. We have simply to deal with a case in which an ordinary judgment creditor sought the aid of a Court of equity to enforce his judgment against property not capable of being reached by any common law process. The only cases of this kind in which Courts of equity ever interfered were cases in which the judgment debtor had an equitable interest in property which could have been reached at law, if he had had the legal interest in it, instead of an equitable interest only. This will be found explained by Jessel, M.R., in *Salt* v. *Cooper* (1), and more recently by Chitty, J., in *Wills* v. *Luff* (2), and by the Court of Appeal in *In re Shephard.* (3) It is an old mistake to suppose that, because there is no effectual remedy at law, there must be one in equity. But the mistake, though old and often pointed out, is sometimes inadvertently made even now. Courts of equity proceeded upon well-known principles capable of great expansion; but the principles themselves must not be lost sight of. The principle on which alone the order in this case could be supported before the Judicature Acts is well explained by Cotton, L.J., in *Anglo-Italian Bank* v. *Davies* (4); it is that Courts of equity gave relief where a legal right existed and there were legal difficulties which prevented the enforcement of that right at law. But the existence of a legal right is essential to the exercise of this jurisdiction. The judgment creditor here has a legal right to be paid his debt, but not out of the future earnings of his debtor; and the Court of Chancery had no jurisdiction to prevent him from earning his living or from receiving his earnings, unless he had himself assigned or charged them. The Court could not restrain him from receiving them until his creditor could attach them under the process of garnishment; nor did the Court ever presume to enlarge a judgment creditor's rights; nor, under colour of assisting him to enforce those rights, did the Court of Chancery reach by its process a kind of property which was not liable to execution. Before debts and money were made

(1) 16 Ch. D. 544.
(2) 38 Ch. D. 197.
(3) 43 Ch. D. 131.
(4) 9 Ch. D. 275.

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liable to an execution by statute, they could not be reached by an ordinary judgment creditor in equity any more than at law. If the earnings could have been reached under a writ of sequestration, a receiver might have been appointed, as in *Willcock* v. *Terrell* (1), but a writ of sequestration was never issued before the Judicature Acts in order to attach a man's personal earnings.

If, therefore, the defendant were in this country, the plaintiff would have no right upon any principle of equity to a receiver of his earnings. The defendant's absence abroad is not a circumstance on which the plaintiff can rely for assistance. That circumstance might avail her if she had a right to the defendant's earnings, and could not get them by reason of the defendant's absence; but such absence does not create a right to the earnings; and it is the non-existence of that right which prevents the plaintiff from obtaining relief. For these reasons we are of opinion that the present case cannot be brought under any principle applicable to the appointment of receivers by the Court of Chancery before the passing of the Judicature Acts.

We pass now to those Acts. The only section expressly applicable to receivers is s. 25, clause 8, of the Judicature Act, 1873, which says that a receiver may be "appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." The order appealed from was made by the Divisional Court under the authority supposed to be conferred by this section. There is no doubt that since the Judicature Acts receivers by way of equitable execution can be appointed in proper cases by all divisions of the High Court on a motion or summons, without the necessity of a fresh action or suit on the judgment. This is plain from *Salt* v. *Cooper* (2); *Smith* v. *Cowell* (3); *Anglo-Italian Bank* v. *Davies* (4), and *In re Peace and Waller*. (5) In *Smith* v. *Cowell* (3) and some other cases the jurisdiction seems to have been rested on s. 25, clause 8, of the Judicature Act, 1873. In *Salt* v. *Cooper* (2) the jurisdiction

(1) 3 Ex. D. 323.
(2) 16 Ch. D. 544.
(3) 6 Q. B. D. 75.
(4) 9 Ch. D. 275.
(5) 24 Ch. D. 405.

was based on those sections which abolish the old Courts and transfer their respective jurisdictions to the High Court, and empower every division of that Court to give complete relief in every case which comes before it. But accepting the construction put upon s. 25, clause 8, of the Judicature Act, 1873, in *Smith* v. *Cowell* (1), and later cases, according to which a receiver can be appointed in a proper case by way of equitable relief at the instance of a judgment creditor against his debtor, the question next arises whether it is "just or convenient" to appoint a receiver in a case of this description. The meaning of this phrase was considered in *North London Railway Co.* v. *Great Northern Railway Co.* (2), and it was there decided that the phrase did not justify the granting of an injunction in a case in which no injunction could be granted by any Court before the Judicature Acts came into operation. The same reasoning obviously applies to the appointment of receivers as well as to the grant of injunctions. Although injunctions are granted and receivers are appointed more readily than they were before the passing of the Judicature Acts, and some inconvenient rules formerly observed have been very properly relaxed, yet the principles on which the jurisdiction of the Court of Chancery rested have not been changed. This has been laid down in several cases decided since those Acts came into operation, notably in *Manchester and Liverpool District Banking Co.* v. *Parkinson.* (3) In *Whittaker* v. *Whittaker* (4), an order nisi was made for the appointment of a receiver to get in a debt which might be attached under the garnishee order; but this case was disapproved in *Manchester and Liverpool District Banking Co.* v. *Parkinson* (3), and cannot be relied on.

In the last-mentioned case an order for a receiver was discharged, because there was no difficulty in enforcing payment of a judgment by the ordinary legal methods. In this case there is such a difficulty; but it does not arise from any impediment which the old Court of Chancery had jurisdiction to remove. The difficulty arises from the fact that future earnings are not by law attachable by any process of execution direct or indirect.

(1) 6 Q. B. D. 75.
(2) 11 Q. B. D. 30.
(3) 22 Q. B. D. 173.
(4) 7 P. D. 15.

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In *Westhead* v. *Riley* (1), and in *In re Coney* (2), receivers were appointed of a debtor's interest in personal property, but the property there in question was of a kind which the execution creditor had a right to reach; and those cases fall far short of being authorities for such an order as that now before us.

In a popular sense, almost any mode of making a man pay his debts may be just, and convenient at least to the creditor; and in that sense it may be just and convenient to appoint a receiver in a case like this. But even in a popular sense such an order may be anything but just or convenient to the newspaper affected by it. The appointment of a receiver is a serious interference with its business. We cannot judicially hold the appointment of a receiver in a case in which no Court could grant a receiver before the Act to be just or convenient within the true meaning of s. 25, clause 8, of the Judicature Act, 1873. We cannot come to the conclusion that this section was intended to alter the law of debtor and creditor, and the relation of employer and employed, to such a very serious extent as the order appealed from, if upheld, would alter them.

We have carefully gone through the Judicature Acts and Orders, including Orders XLII. to XLVI., relating to executions and similar matters, and we have examined the cases in the Law Reports in which receivers have been appointed since those Acts came into operation, but we can find no enactment or rule or authority on which the order appealed from can be supported. Order XLII., r. 3, only enables a receiver to be appointed where one could be appointed before the Judicature Acts came into operation. The rules relating to sequestration have never been understood as extending to such a case as this. The Divisional Court did not allude to them; nor did counsel rely on them. We only mention them to shew that they have not been overlooked.

Again, we have not to consider whether it would be possible to reach these earnings by proceedings in Bankruptcy or under the Judgment Debtors Act; for no such proceedings have been taken.

The conclusion of the whole matter is that the order appealed

(1) 25 Ch. D. 413. (2) 29 Ch. D. 993.

from is not warranted either by the Judicature Acts, and rules, or by any principle by which Courts of law or equity were guided before those Acts were passed. It follows that there was no jurisdiction to make the order.

Unless a man has assigned or charged his future earnings or has made a sum payable out of them, they cannot be prospectively impounded by any of his creditors by any ordinary process of execution, whether legal or equitable. If the law in this respect is to be altered, it must be done by the legislature. But the law ought not to be altered by stretching what are called equitable executions, or, in other words, by appointing receivers in cases to which the equitable jurisdiction of the Court of Chancery had no application. Fry, L.J., was quite right when he warned the profession against supposing that the appointment of a receiver is a form of execution which can be obtained "without shewing to the Court the existence of the circumstances creating the equity on which alone the jurisdiction arises." See *In re Shephard.* (1)

The order appealed from must be discharged.

Appeal allowed.

Solicitors for plaintiff: *Dixon, Weld & Dixons.*
Solicitors for defendant: *Colyer & Colyer.*

(1) 43 Ch. D. 131, at p. 138.

E. L.

C. A.
1893
March 13.

[IN THE COURT OF APPEAL.]

NECK *v.* TAYLOR.

Practice—Security for Costs—Counter-claim arising out of same Transaction as Claim—Counter-claim substantially amounting to Defence—Discretion.

Where a defendant resident out of the jurisdiction set up a counter-claim which arose out of the same transaction as the claim and was in substance, though not technically, in the nature of a defence to the action :—

Held, that the Court had a discretion to refuse to order the defendant to give security for the costs of the counter-claim.

APPEAL from the order of a Divisional Court (Lord Coleridge, C.J., and Collins, J.), setting aside an order at chambers which directed that the defendant should give security for the costs of the counter-claim.

The facts were as follows. The action was brought by the plaintiff, a boarding-house keeper, for the sum of 69*l.*, the balance of an account for board and lodging supplied to the defendant, after giving credit for payments made. The defendant in her statement of defence denied that she was indebted as alleged in the claim; and counter-claimed in respect of the wrongful detention of certain jewellery. She alleged in the counter-claim that the plaintiff by force and threats induced and constrained her to part with a diamond ring, and wrongfully refused to deliver to her and retained certain other jewellery, which she had deposited with the plaintiff for safe custody; and she claimed a return of the ring and other jewellery or 250*l.* damages. Particulars of the counter-claim had been delivered, which stated that the plaintiff refused to allow the defendant to leave the boarding-house until she had handed over a diamond ring to the plaintiff; that the plaintiff represented to the defendant that by the law of England the defendant must remain in the house till she paid plaintiff's demand; that the defendant, constrained by such threats and acting on the plaintiff's representations, parted with the diamond ring as aforesaid, in order to obtain liberty to leave the house; and that the plaintiff, in whose custody the rest of the jewellery was deposited, refused to deliver the same on the defendant's demand,

and compelled the defendant to depart without delivery of the same, and still withheld the same. The defendant was a foreigner and was resident out of the jurisdiction. It appeared from the affidavits, that the plaintiff had given the defendant a receipt for the jewellery, stating it to be deposited as a security for the sum of 69*l.* owing to the plaintiff. The plaintiff applied at chambers for an order that the defendant should give security for the costs of the counter-claim, and the master granted the application. The judge at chambers, on appeal, affirmed the decision of the master. But the Divisional Court, on appeal, reversed his decision, and set aside the order for security for costs.

Rose-Innes, for the plaintiff. The counter-claim in this case is not in the nature of a set-off. It is a distinct claim for damages for a tort wholly independent of the claim and to a greater amount. It must be treated as a cross-action in which the defendant is the actor, and therefore, being resident out of the jurisdiction, she ought to give security for the costs of it.

[LORD ESHER, M.R. In the case of an action upon a contract and counter-claim for damages for breaches of the same contract, would it necessarily be right to treat the defendant as a plaintiff in a cross-action in respect of the counter-claim?]

It is submitted that the tort here complained of by the defendant cannot be said in a legal sense to arise out of the same transaction as the claim.

[LORD ESHER, M.R. It arose out of the relation of boarding-house keeper and lodger. It seems probable upon the facts alleged that the plaintiff in substance claimed a lien on these goods for the board and lodging supplied to the defendant.]

[He cited *Sykes* v. *Sacerdoti* (1); *Winterfield* v. *Bradnum* (2); *Mapleson* v. *Masini* (3); *Lake* v. *Haseltine.* (4)]

Beven, for the defendant. This counter-claim is really the defence to the action; and it would not be just that the defendant should be precluded from setting it up, as might be the case if she has to give security. The true test in these cases is that

(1) 15 Q. B. D. 423.
(2) 3 Q. B. D. 324.
(3) 5 Q. B. D. 114.
(4) 55 L. J. (Q.B.) 205.

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laid down in *Sykes* v. *Sacerdoti* (1), viz., whether the counter-claim arises out of the same transaction as the claim. If so, the defendant is not, for this purpose, really in the position of a plaintiff in a cross-action. If a defendant is really in the position of an actor in respect of the counter-claim, and is resident abroad, he must, no doubt, give security for costs; otherwise, he need not.

In this case it is contended that the defendant's counter-claim must be regarded as in substance a defence. In *Sykes* v. *Sacerdoti* (1), and in *Winterfield* v. *Bradnum* (2), the claim was no longer in dispute, and therefore the only litigation pending was on the counter-claim.

Rose-Innes, in reply.

LORD ESHER, M.R. The rule laid down by the cases seems to be as follows. Where the counter-claim is put forward in respect of a matter wholly distinct from the claim, and the person putting it forward is a foreigner resident out of the jurisdiction, the case may be treated as if that person were a plaintiff, and only a plaintiff, and an order for security for costs may be made accordingly, in the absence of anything to the contrary. Where, however, the counter-claim is not in respect of a wholly distinct matter, but arises in respect of the same matter or transaction upon which the claim is founded; the Court will not, merely because the party counter-claiming is resident out of the jurisdiction, order security for costs; it will in that case consider whether the counter-claim is not in substance put forward as a defence to the claim, whatever form in point of strict law and of pleading it may take, and, if so, what under all the circumstances will be just and fair as between the parties; and will act accordingly. Therefore, the Court in that case will have a discretion. It is clear to me in the present case that the counter-claim is not in respect of a matter wholly distinct from and independent of that upon which the claim is based; on the contrary, it arises out of the very same transaction in respect of which the action is brought. It is, in reality, the defendant's defence to the action, though, as a matter of pleading, it is, and

(1) 15 Q. B. D. 423. (2) 3 Q. B. D. 324.

necessarily is, put forward by way of counter-claim. Under these circumstances, I think that the Divisional Court had a discretion in the matter, and I see no reason for thinking that they exercised such discretion otherwise than rightly.

For these reasons, I think that the appeal should be dismissed.

LINDLEY, L.J. I am of the same opinion. The matters set out in the counter-claim appear to me to be of such a nature and so closely connected with the cause of action that, whatever according to legal technicalities they may be called, they are, in substance, in the nature of a defence to the action. The plaintiff sues for a debt for which he holds security. The defendant says, "I owe you nothing; give me back my security." Under these circumstances, it does not seem to me just or fair that the defendant should have to give security for costs as the price of being allowed to plead such defence.

LOPES, L.J. In cases of this kind we ought, I think, to have regard, not so much to the record, construed according to the strict rules of pleading, as to the substantial position of the parties to the record. Bearing that in mind, it seems to me that the facts set up in this counter-claim are in the nature of a defence, arising as they do out of the same set of circumstances as the claim; and therefore it would not be right to require the defendant to find security for costs, although she is resident abroad. For these reasons, I think that the decision of the Court below was right and that this appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *Guilford E. Lewis.*

Solicitors for defendant: *Ravenscroft, Hills, & Woodward.*

E. L.

C. A.

1893

Feb. 27;
March 14.

[IN THE COURT OF APPEAL.]

FORSTER *v.* FARQUHAR AND OTHERS.

Practice—Costs—Discretion of Court over—"Good Cause"—Trial by Jury—Plaintiff successful on the event of the Action—Items of Damage on which Defendant successful—Order LXV., *r.* 1.

No closer definition can be given of what will constitute "good cause," under Order LXV., r. 1, for making an order in a case tried with a jury that costs shall not follow the event, than that there will be good cause, whenever it is fair and just as between the parties that such an order should be made.

In an action for breach of a contract to put the drainage of a house into good condition, which was tried with a jury, the plaintiff claimed as special damage certain items in respect of expenses incurred by him in consequence of an illness which broke out in his family. The plaintiff did not make this claim oppressively or vexatiously, but was acting on an opinion expressed by his medical man that such illness was occasioned by defective drainage. The jury gave a verdict in the action for the plaintiff, but found, with regard to the special damage claimed as above mentioned, that the illness in plaintiff's family did not arise from the defects in the drainage:—

Held, that there was "good cause" for making an order that the plaintiff, though successful in the action, should pay to the defendants the costs of the items of special damage in respect of which he had failed.

APPEAL from the order of Cave, J., directing that the plaintiff should pay the defendants' costs in relation to the first three items of special damage claimed by the plaintiff.

The action, which was tried by the learned judge with a jury, was for breach of an agreement to put the drainage of a house into good condition. The facts appeared to be as follows. The plaintiff agreed to take a lease of a house from the defendants, on their undertaking to put the drainage of the house into good condition, which they accordingly agreed to do. The lease was executed, and the plaintiff entered into occupation of the house. Shortly afterwards the plaintiff's children and some of his servants were attacked by scarlet fever, which the medical man called in by the plaintiff attributed to defective drainage. The drainage of the house was, in consequence, examined and found to be defective. The plaintiff thereupon brought the action, alleging in his statement of claim that the illness in his family was occasioned by the defective drainage, which was denied in the

statement of defence. The plaintiff, in his statement of claim, claimed special damages as follows: (1.) Medical attendance, medicine, and nurses, 217*l.* 19*s.*; (2.) Cost of disinfection of house and furniture, and removal of the same, 109*l.*; (3.) Cost of houses to which plaintiff's family and household were removed, and expenses of removal, 40*l.*; (4.) Fees and expenses of sanitary engineer, 26*l.* 18*s.* 6*d.*

Evidence was given by medical men at the trial, according to which the scarlet fever in plaintiff's family was not occasioned by the defects in the drainage. The jury found for the plaintiff for 12*l.* 12*s.* damages under head (4.), for which judgment was given for the plaintiff; but, with regard to the other heads of damage, they found that the scarlet fever had not been caused by the defective drainage. The judge, upon such finding of the jury, refused to certify for costs under the County Courts Act, 1888, s. 116, and made the order appealed against.

Barnard Lailey, for the plaintiff. Under Order LXV., r. 1, in cases tried with a jury the costs follow the event, unless "for good cause" the judge otherwise orders. In this case the plaintiff, having recovered less than 20*l.*, was deprived of costs by s. 116 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), but for which he would, under Order LXV., r. 1, be entitled to costs in the absence of an order "for good cause" to the contrary. The judge has ordered the plaintiff, the successful party in the litigation, to pay the defendants' costs of certain items of special damage claimed. He has really treated the case as if these items were separate "issues" in the cause, which they clearly are not. He had not jurisdiction to order the plaintiff to pay these costs without "good cause," and it is submitted that there is nothing that could constitute "good cause" here. The plaintiff, though unsuccessful in respect of these heads of damage, clearly acted bonâ fide in claiming them, as he acted on the opinion of his medical man. There is no ground for any suggestion that he acted oppressively or malâ fide in making these claims. It is submitted that to constitute good cause within Order LXV., r. 1, there must be something in the nature of misconduct or oppression on the part of the plaintiff: *Cooper*

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v. *Whittingham.* (1) The mere fact that a plaintiff bonâ fide overestimates his damages is not misconduct or oppression. [He also cited *Jones* v. *Curling* (2); *Huxley* v. *West London Extension Ry. Co.* (3)]

Channell, Q.C., and *Marchant Williams*, for the defendants. The meaning of the expression "good cause" in Order LXV., r. 1, is not confined to cases of oppression and misconduct by the successful party. In any case where it would be unjust that the costs should follow the event, there is good cause for ordering otherwise. The questions, whether these items of damage claimed had respectively been occasioned by the breach of contract, may not have been issues in the strict technical sense of the term, but they were distinct questions in dispute between the parties upon the pleadings. Issues in their nature distributive are construed distributively for the purpose of taxation. It is only just that the same principle should be applied where there are questions which, though not technically "issues," are yet distinct matters in dispute, and on which the party, who is unsuccessful on the general event of the litigation, has succeeded. It would be unjust that the defendants, who have succeeded on what was really the most important and expensive question in the litigation, should have to pay the costs incurred by them in relation to that question. This is not a mere question of an exaggerated estimate of a claim on which the plaintiff succeeds—a case which might admit of different considerations. It is the case of distinct claims of damages on which the plaintiff fails. [They cited *Roberts* v. *Jones.* (4)]

Barnard Lailey, in reply.

Cur. adv. vult.

March 14. The judgment of the Court (Lord Esher, M.R., Lindley, L.J., and Bowen, L.J.) was delivered by

BOWEN, L.J. The old question has been once more brought before us as to what constitutes, within Order LXV., r. 1, "good cause" for an order of a judge, after a trial by jury, interfering with the ordinary result as to costs. It has often been pointed

(1) 15 Ch. D. 501.
(2) 13 Q. B. D. 262.
(3) 14 App. Cas. 26.
(4) [1891] 2 Q. B. 194.

out by this Court that it is impossible to define beforehand the circumstances which may constitute "good cause," and that it is by no means desirable to attempt to limit language which the rule has left broad and simple. Light may, however, be thrown on the meaning of the words by considering the scope and object of the rule in which they occur.

Subject to certain exceptions, costs in cases tried at common law used in former days to follow the event of the action. Order LXV., r. 1, placed all costs both at common law and in Chancery cases, subject to an exception which need not be considered, in the discretion of the judge, but added a proviso in respect of matters tried with a jury. The proviso enacts that "where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried shall for good cause otherwise order." The event which the costs are in general to follow is not, it will be observed, the verdict of the jury, but the event of the litigation. The jury may find a verdict for one party, and nevertheless the judgment in the end may be entered by the Court for the other. In such a case the costs, if left to the ordinary course, would follow, not the verdict, but the judgment, as in the days before the Judicature Acts. When the verdict of the jury was decisive of the action, then costs would, by the general operation of the rule, follow the verdict of the jury, as also was the case in old times. Then comes the exception engrafted on the proviso, "unless the judge shall for good cause otherwise order." The general intention being that where there is a jury trial the successful party shall receive costs and the loser pay them, where will there be a good cause, or, in other words, a sufficient reason, for directing that it shall be otherwise? No nearer and no closer definition can be given than that there will be good cause whenever it is fair and just as between the parties that it should be so. This was, in fact, the view substantially taken in the Appeal Court in the case of *Jones* v. *Curling*. (1) "The facts," says the present Master of the Rolls, "must shew the existence of something, having regard either to the conduct of the parties or to the facts of the case,

(1) 13 Q. B. D. 262.

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Bowen, L.J.

which makes it more just that an exceptional order should be made than that the case should be left to the ordinary course of taxation." "Good cause," says Bowen, L.J., "really seems to me to mean that there must exist facts which might reasonably lead the judge to think that the rule of the costs following the event would not produce justice as complete as the exceptional order which he himself could make." "I will not attempt," says Fry, L.J., "to give any definition of what 'good cause' is, but it plainly must be something which renders it reasonable that the judge should interfere with the rule that the costs should follow the event."

It has become usual in cases which arise under this rule to cite to us language of the late Master of the Rolls, Sir George Jessel, in the case of *Cooper* v. *Whittingham* (1), as if it contained an exhaustive definition of "good cause" under Order LXV., r. 1. The case of *Cooper* v. *Whittingham* (1) was not a decision on the meaning of the term "good cause." It was an enunciation of a principle upon which, in the opinion of the Master of the Rolls, judges should exercise their discretion under the earlier portion of the rule which relates to actions tried before a judge without a jury. Against any attempt on the part of any Court to impose by definition or otherwise a fetter on the discretion which the law has left to a judge in any particular case this Court has always protested. It would be far too narrow a view were we to hold that good cause only exists where there has been misconduct, oppression, or injustice on the part of the successful party. No such limitation is to be found in the rule; and as a matter of reason it is clear that a successful litigant need not have been guilty of injustice or oppression to make it unfair that he should cast on his opponent all the costs of the litigation. The measure of what is fair as to costs is not to be found in a mere consideration of his conduct toward the opposite side. It may have been reasonable from his point of view to do that which it would be unreasonable to make the opposite litigant pay for. Although he has won the action, he may have succeeded only upon a portion of his claim under circumstances which make it more reasonable that he

(1) 15 Ch. D. 501.

should bear the expense of litigating the remainder than that it should fall on his opponent. The point is not merely whether the litigant has been oppressive in the way he waged his suit or prosecuted his defence, but whether it would be just to make the other side pay. We can get no nearer to a perfect test than the inquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that the costs should follow upon success. Such was, as has been stated already, the view of this Court laid down in *Jones* v. *Curling*. (1) Such was certainly the view adopted in the House of Lords in *Huxley* v. *West London Extension Ry. Co.* (2) "I cannot entertain a doubt," says Lord Halsbury, L.C., "that everything which increases the litigation and the costs, and which places on the defendant a burden which he ought not to bear in the course of that litigation, is perfectly good cause for depriving the plaintiff of costs." The language of Lord Watson is to the same effect: "I shall not attempt," he says, "a complete definition of what is meant by these words. They at all events embrace in my opinion everything for which the party is responsible connected with the institution or conduct of the suit and calculated to occasion unnecessary litigation and expense."

Treated from the above point of view, the present case under appeal appears to us to be easy of decision. The plaintiff, as the jury found, had a grievance against the defendants in respect of a breach of contract for which 12*l.* 12*s.* would be sufficient compensation. Serious expense, however, was occasioned at the trial by reason of the plaintiff having put forward a claim under a head of damage which he failed, in the opinion of the jury, to make good. The expert witnesses called by the defendants to rebut this untenable head of damage cost money and time. The plaintiff cannot indeed be said to have been acting oppressively or vexatiously in putting forward this portion of his claim. He was acting, in fact, on the opinion—though, as it afterwards turned out, the untenable opinion—of his own medical man. But why should any burden in respect of this portion of the plaintiff's claim be cast upon the defendants? It is said

(1) 13 Q. B. D. 262. (2) 14 App. Cas. 26.

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Bowen, L.J.

by the plaintiff that the various items of damage claimed do not create separate issues in the pleader's sense, nor for purposes of taxation. That is perfectly true; but it is a mere technicality of pleading and of the taxing office, which has survived to us from the time when pleadings were more accurate and when the term "issue" had a recognised meaning with respect to them. The real controversy in the present action was as to the damage suffered, and the question as to damage, though not an issue in the pleader's sense of the word, was a matter in controversy and one which could be split up into separate heads, each involving a different class of evidence. For all purposes of justice these separate heads of controversy were different issues, though not different issues, nor even issues at all, in the sense in which pleaders use the term. Why should the defendants, whose defence has succeeded on the most expensive and the most important of these heads of controversy, bear the cost of litigating it? If by making a special order as to costs the judge could apply distributively to these heads of controversy the maxim that he who loses pays, was it not fair and reasonable so to direct? It seems to us that it was. So far from thinking that Cave, J., had no good cause for making the order he did, what he has directed appears to us, on the contrary, to be an exact and admirable instance of the way in which, in the hands of a competent and accurate judge, the rule as to good cause can usefully be applied.

For these reasons, we think that the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Cave & Co.*

Solicitors for defendants: *Walfords.*

E. L.

RASSAM *v.* BUDGE.

1893
March 16.

Practice—Striking out Pleadings—Slander—Defamatory Words set out in Statement of Claim—Defence, that different Words were spoken, and were True and Privileged—Embarrassing Pleading.

To a statement of claim setting out defamatory words, alleged to have been spoken by the defendant of the plaintiff, the defendant pleaded that he "did say the following words," and proceeded to set out his own version of what he had said, which differed materially from the words set out in the statement of claim; and then alleged that the words spoken by the defendant were true in substance and in fact, and were spoken on a privileged occasion.

On a motion to strike out this defence:—

Held, that the defence, as pleaded, was embarrassing, and tended to prejudice the fair trial of the action, and must therefore be struck out.

Appeal by the plaintiff from an order made by Kennedy, J., at chambers, varying an order made by the Master, and ordering that an amended defence should stand.

The notice of motion asked that the whole of paragraphs 10 and 14, and the words "and all statements made by the defendant upon the said occasion" in paragraphs 12 and 16 of the amended defence, be struck out, on the ground that the same were unnecessary and irrelevant, and raised wholly immaterial issues, and disclosed no answer to the plaintiff's cause of action, but were embarrassing, and tended to prejudice and delay the fair trial of the action.

The action was brought to recover damages for libel and slander.

The pleadings, so far as material to the question raised by this appeal, were as follows:—

The statement of claim alleged, and the defence admitted, that the plaintiff had been employed by the trustees of the British Museum to conduct antiquarian researches and excavations in Asiatic Turkey.

Paragraph 6 of the statement of claim was as follows:—

"In or about the month of June, 1891, the defendant falsely and maliciously spoke and published of the plaintiff, and of him as such agent of the British Museum as aforesaid, the words following:—

(*a*) "This is the kind of thing Rassam sent home. Other

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people got all the whole tablets; we got the fragments—mere rubbish. The overseers who carried on the excavations were his" (meaning the plaintiff's) "relations, and they picked out all the good tablets, and sold them to the Germans, Americans, and others. There was great dishonesty on the part of these men. Oh, yes; the overseers were his relations. David Thoma was his relation, and so were the others. He allowed these men to appropriate the perfect tablets from our excavations at Abou Hubba and elsewhere which belonged to the British Museum, and ought to have been sent here, and to sell them to the agents of the Berlin and other museums."

(*b*) "I may be wrong about the overseers being his relations; but there is no doubt he" (meaning the plaintiff) "connived at their robberies. He enabled them to send to England for sale a case full of the tablets they had stolen among the cases which he was forwarding to England. His cases contained only the merest fragments for the British Museum; his men had collected all the best and entire tablets, and sold them to the agents of the different museums. They actually sent a number to England for sale. And what is more, he himself" (meaning the plaintiff) "brought a case of such tablets to England as part of his consignment to the British Museum, and then handed this case over to these overseers' agents, or to the agents of some Baghdad dealer in London."

(*c*) "Whilst he" (meaning the plaintiff) "was carrying on the excavations at Abou Hubba, he lived at Baghdad, and rarely went to the ruins, leaving the overseers to do as they liked there. He stayed at Baghdad, and employed himself in smuggling spirits into the city in violation of the Turkish law."

Paragraph 7. "The defendant meant, and was understood to mean, thereby, that the plaintiff had habitually neglected his duties, and grossly misconducted himself in his office as agent of the British Museum, and had himself defrauded, and had assisted others to defraud, his employers the trustees of the British Museum, and had appropriated to his own use property belonging to the British Museum, and had assisted in and connived at such robbery by others, and had committed various indictable offences."

Paragraph 10 of the amended defence, was as follows:—

"The defendant, upon the said date, did say the following words:

"'That the men employed by the plaintiff and the British Museum in the said excavation, appropriated tablets and other antiquities, and sold them to other persons and to agents of other museums. That tablets, which must have been dug from the said sites, had been sold to Germans and Americans, and that the British Museum had made a large purchase of such tablets in open market; and that the tablets so purchased were in a more perfect condition, and more valuable, than those forwarded directly to the British Museum.'

"The said words were and are true in substance and in fact, and were published on a privileged occasion, as hereinafter appearing in paragraph 12 of this defence."

Paragraph 12 alleged that, if the defendant spoke or published the words set out in sect. (*a*) of paragraph 6 of the statement of claim, they were spoken under certain circumstances, which were stated, and that the words, if spoken, "and all statements made by the defendant upon the said occasion," were spoken bonâ fide, without malice, and under circumstances shewing privilege.

Paragraph 14 was as follows:

"The defendant, upon the said occasion, did speak the following words:

"'That while the plaintiff was conducting the said excavations, cases of tablets were forwarded to England by other agents, and purchased by the British Museum. That the tablets so purchased must have been obtained from the sites of the excavations made by the plaintiff. That other cases of tablets derived from the said sites were sold to agents of other museums during the said excavations. That the majority of antiquities sent home during the plaintiff's conduct of the said excavations were fragments or imperfect tablets. That the best tablets and antiquities obtained by the British Museum from the localities where the said excavations had been made had been purchased in open market, and from other agents. That the men employed by the plaintiff and the British Museum in the said excavations dug up and

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appropriated tablets, and sold them to the said agents, and to agents of other museums.'

"The said words were and are true in substance and in fact, and were published by the defendant on a privileged occasion, as hereinafter appearing in paragraph 16 of this defence."

Paragraph 16 alleged that, if the defendant spoke and published the words set out in sects. (*b*) and (*c*) of paragraph 6 of the statement of claim, they were spoken under certain circumstances, which were stated, and that the words, if spoken, "and all statements made by him upon the said occasion," were spoken bonâ fide, without malice, and under circumstances shewing privilege.

Blake Odgers, for the plaintiff. This mode of pleading is embarrassing, and ought not to be allowed: *Bremridge* v. *Latimer* (1); *Alexander* v. *North Eastern Ry. Co.* (2) The words set out in the statement of claim are clearly actionable, and it is no answer to the plaintiff's case to allege that the defendant spoke entirely different words, which would not be actionable without an innuendo, and that those words are true. If this is proved at the trial, the plaintiff's case still remains unanswered. If the defence is that the defendant did not speak the words complained of, he ought simply to deny the publication, without adding this long and embarrassing statement, and if he proves his denial he will be entitled to the verdict. The defendant is setting up an immaterial issue. No doubt, in some cases, a denial of publication may be pleaded to one part of a libel or slander, and a justification to another part, but that is so only where the statements are severable, which is not the case here.

Temple Franks, for the defendant. *Bremridge* v. *Latimer* (1) is distinguishable, for in that case the defendant set out in his pleas other words in addition to those complained of in the declaration.

[LORD COLERIDGE, C.J. In that case Byles, J., said: "The law is plain that, if you wish to dispute the sense given to the words in the libel, you must do so by the plea of not guilty, and, if you wish to justify, you must confess and avoid." (3)

(1) 12 W. R. 878. (2) 34 L. J. (Q.B.) 152. (3) 12 W. R. at p. 879.

That is a very clear and very concise statement of the law as it then was, and, though the forms of pleading have been altered, the substance of the rule is still the same. That decision, though not directly in point in the present case, comes very near it.]

What the defendant is seeking to set up here amounts to "facts which the party pleading is entitled to prove at the trial," within the meaning of the judgment of Lord Selborne, L.C., in *Millington* v. *Loring*. (1) That decision was followed in *Whitney* v. *Moignard*. (2) This defence deals specifically with each allegation of fact, and is in accordance with the Rules of the Supreme Court, 1883, Order XIX., rr. 17, 19. Moreover, the defendant is entitled to state his version of the conversation for the purpose of raising the defence of privilege. The facts stated in the defence might also be proved at the trial in mitigation of damages.

Blake Odgers was not heard in reply.

LORD COLERIDGE, C.J. I am clearly of opinion that this appeal ought to be allowed, and paragraphs 10 and 14 of the defence, and the passages complained of in paragraphs 12 and 16, ought to be struck out. In the old common law actions of libel and slander the pleadings were short, and were not generally found to be embarrassing. The points to be decided were, whether the words alleged in the declaration were written, or spoken, and published; whether those words were true, and whether the publication was privileged. But these pleadings do not raise or support any of those points. The plaintiff alleges that the defendant spoke and published the words set out in the statement of claim. The only way to meet that allegation, according to the passage from the judgment of Byles, J., in *Bremridge* v. *Latimer* (3), to which I referred in the course of the argument, is to plead that the words in question were not spoken and published, or that they were spoken and published, and are true, or that they were spoken and published, and are privileged. But the defendant does

(1) 6 Q. B. D. 190, at p. 194. (2) 24 Q. B. D. 630.
(3) 12 W. R. 878, at p. 879.

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Lord Coleridge, C.J.

what is very different from that, and what, to my mind, is extremely embarrassing. He pleads that he did not say the words alleged in the statement of claim; but that he did say something else. He gives a different version of the conversation, and alleges that the words, which, according to his own version, not according to the plaintiff's version, he used, are true. If the words proved at the trial to have been spoken are substantially the same as those alleged by the plaintiff to have been spoken, and the jury find that this is so, then, in the absence of justification or privilege, the plaintiff would succeed; but if, as the defendant alleges, the words are wholly different, the plaintiff fails to prove his case, and no justification is required. There appears to have been a long conversation. The defendant sets out the whole of it, and pleads that what he did say, which according to him is different from what the plaintiff alleges he said, is true. What is the issue for the jury raised by such a defence? Is it whether the words complained of in the statement of claim were spoken and published, or whether those words are true? Clearly it is neither, for the defendant sets up other words. The judgment of the Court of Appeal in *Millington* v. *Loring* (1) has no bearing on the present case.

A. L. SMITH, L.J. I am of the same opinion. This is an ordinary common law action for libel and slander. By the old practice under the plea of not guilty, the defendant could prove that he did not write or say the words, or that the publication was privileged, and he might also plead and prove a justification on the ground that the words were true. In the present case the defendant, in a long defence, in substance alleges that he said something quite different from what the plaintiff alleges he said, and that what he said, according to his own version, is true. There is a string of authorities to the effect that a defendant cannot justify part of a libel or slander, unless he can shew clearly that the statements are severable. In the present case, on reading the statement of claim, I can entertain no doubt as to the correctness of the innuendo. What then does the defendant do? He puts on the record what in substance

(1) 6 Q. B. D. 190.

amounts to a statement that the plaintiff's men are rogues, but not the plaintiff himself. It is like pleading to a statement of claim, alleging that the defendant had said the plaintiff stole a pair of boots, that what the defendant said was that the plaintiff's footman stole the boots, and that was true.

Appeal allowed.

Solicitors for plaintiff: *Emmet, Son, Stubbs, & Melhuish.*
Solicitors for defendant: *Lewis & Lewis.*

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.

1893

March 20.

WITTED *v.* GALBRAITH AND OTHERS.

Practice—Service out of the Jurisdiction—Co-defendant within the Jurisdiction—"Action properly brought"—Rules of Supreme Court, 1883, *Order* XI., *r.* 1 (*g*).

In order to bring a case within Order XI., r. 1 (g), under which service out of the jurisdiction of a writ of summons may be allowed whenever "any person out of the jurisdiction is a necessary and proper party to an action properly brought against some other person duly served within the jurisdiction," the plaintiff must have an apparent cause of action against the person served within the jurisdiction, and must not merely have joined such person in order to be able to sue, within the jurisdiction, a person who is out of the jurisdiction.

APPEAL from a judgment of the Divisional Court (1), on a motion to set aside a writ of summons and the service of the writ out of the jurisdiction.

The action was brought under Lord Campbell's Act (9 & 10 Vict. c. 93) to recover damages for the death of the plaintiff's husband.

The defendants were Dunlop & Sons, who carried on business at Glasgow, and were owners of the vessel *Queen Adelaide*, and Galbraith, Pembroke & Co., who were shipbrokers carrying on business in London.

The ship the *Queen Adelaide* came into the South Dock at Millwall, and Galbraith, Pembroke & Co. applied to the dock company to have the vessel unloaded. The plaintiff's husband, a stevedore in the service of the dock company, went on board

(1) Ante, p. 431.

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the vessel to take part in the unloading and was killed by falling down a hatchway, which it was alleged was insufficiently protected.

The writ was served on Galbraith, Pembroke & Co. within the jurisdiction, and the plaintiff then obtained an order for the issue of a concurrent writ and service thereof upon Dunlop & Sons, at Glasgow, out of the jurisdiction, and the writ was served accordingly.

Dunlop & Sons took out a summons to set aside the writ and service, which was referred to the Court. The Divisional Court refused the motion to set aside the writ. (1)

The defendants, Dunlop & Sons, appealed.

Joseph Walton, Q.C., and *Hollams*, for the defendants, Dunlop & Sons, in support of the appeal. The defendants who are out of the jurisdiction can only be served under Order XI., r. 1 (*g*) (2), if, in the terms of the order, the action is "properly brought" against the other defendants. It lies on the plaintiff to shew that the brokers had anything to do with unloading the ship, which is the duty of the master. If they had no duty in that respect, the action is not properly brought against them, and the order for service of the writ on Dunlop & Sons out of the jurisdiction was wrong.

Coleridge, Q.C., and *W. Howland Roberts*, for the plaintiff. It may be that the brokers were acting for the owners with regard to the unloading, and knew of the state of the hatchway. If so, they invited the dock company and their servants to unload without telling them of the danger, and they would be liable in this action. The pleadings raise this question of liability, and the plaintiff ought to be able to proceed to determine it. [They cited *Massey* v. *Heynes* (3); *Heaven* v. *Pender* (4); and *Indermaur* v. *Dames*. (5)]

(1) Ante, p. 431.

(2) By Order XI., r. 1, "service out of the jurisdiction of a writ of summons . . . may be allowed by the Court or a judge whenever . . . (*g*) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

(3) 21 Q. B. D. 330.

(4) 11 Q. B. D. 503.

(5) Law Rep. 1 C. P. 274; 2 C. P. 311.

Joseph Walton, Q.C., in reply. The onus is not on Dunlop & Sons to shew that Galbraith, Pembroke & Co. had no such duty as is suggested. Some actual, or at least plausible, case must be made out by the plaintiff, and it is not enough to say that conceivably there may be some case against the brokers.

LINDLEY, L.J. This case presents some difficulties, but not, I think, any that cannot be surmounted by the exercise of a little common sense. The question is whether this is a proper case for service on some of the defendants out of the jurisdiction. The action is brought against the owners of a vessel and their inward brokers. The theory of the case put forward by the plaintiff is that he is entitled to sue the brokers who are within the jurisdiction, and to add as defendants the owners who are without the jurisdiction, and to ask for an order to serve the latter out of the jurisdiction. The rules as to service out of the jurisdiction were recast in 1883 with great care, and the former rules on the matter were much limited.

The rule that now applies is Order XI., r. 1 (*g*), and it is said that the present case comes within that rule. There is a very easy method of testing whether this is true. Supposing that both the defendant firms were resident within the jurisdiction, would they both have been joined in the action? I cannot think so; there is no plausible cause of action against the brokers. I come to the conclusion that the brokers have been brought into the action simply to enable the plaintiff to bring the other defendants within the jurisdiction. It is not a bonâ fide case of an action properly brought against a person who has been served within the jurisdiction. Consequently there is no right to proceed under the order, and the appeal must be allowed.

KAY, L.J. I am of the same opinion, though I come to the conclusion with some regret. The accident happened within the jurisdiction, the witnesses are here, and certainly this would seem the proper place in which to try the action.

Looking at the pleading, as I have done very carefully, it seems to me plain that the pleader felt the very great difficulty

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Kay, L.J.

of framing a pleading shewing any liability on the part of the brokers. I agree that everything shews that the brokers have been joined as defendants only for the purpose of bringing in the Scotch owners so that they may be sued in these Courts. This is not within the Order, and the appeal must be allowed, and the writ and service set aside.

Appeal allowed.

Solicitor for plaintiff: *F. Deakin.*

Solicitors for defendants: *Hollams, Son, Coward, & Hawksley.*

A. M.

C. A. 1893 *March* 14.

[IN THE COURT OF APPEAL.]

WHITE *v.* COHEN.

Practice—County Court—Costs—Action commenced in High Court and transferred to County Court—Recovery of Sum less than 20*l.*—*County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *ss.* 65, 116.

Sect. 65 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), gives power to a judge of the High Court in any action of contract brought in the High Court, and in which the claim does not exceed or is reduced to 100*l.*, on the application of either party, to order that the action shall be tried in any Court in which it might have been commenced, and provides that thereupon the action shall be tried in such Court as if it had been originally commenced therein, "and the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts, and the costs of the order and all proceedings previously thereto shall be allowed according to the scale of costs for the time being in use in the Supreme Court."

By s. 116: "With respect to any action brought in the High Court which could have been commenced in a county court . . . if, in an action founded on contract, the plaintiff shall recover a sum less than 20*l.* he shall not be entitled to any costs of the action."

The plaintiff brought an action of contract in the High Court which could have been commenced in a county court, and which, after some proceedings in the High Court, was transferred to a county court under the provisions of s. 65. He recovered a sum less than 20*l.*:—

Held, affirming the judgment of the Queen's Bench Division, that s. 116 is applicable to all actions brought in the High Court which might have been brought in the county court whether tried in the High Court or ordered to be tried in the county court under s. 65, and that it applies to all costs of such actions, and not only to so much of them as in a case ordered to be tried in the county court have been incurred antecedently to such order, and that the plaintiff was therefore not entitled to any costs of the action.

APPEAL from the decision of the judge of the City of London Court.

The writ in the action was issued in the Queen's Bench Division of the High Court of Justice, claiming 27*l.* 10*s.* for goods sold and delivered. The plaintiff applied for judgment under Order XIV., and the Master made an order, by which the defendant was given leave to defend on bringing the amount claimed into Court, and by which the action was transferred to the City of London Court, under s. 65 of the County Courts Act, 1888. An appeal from this order was dismissed by the judge at chambers, and the action was entered in the City of London Court, in pursuance of the order. Subsequently the defendant served the plaintiff with notice of set-off for 8*l.* 2*s.* for goods sold and delivered. The case was tried by consent before the registrar of the Court, who found for the plaintiff for the amount of his claim, and for the defendant for the amount of his set-off, and accordingly entered judgment for the plaintiff for 19*l.* 8*s.*, being the balance due to him. The plaintiff carried in a bill of costs for taxation; but the registrar considered that under s. 116, sub-s. 1, of the County Courts Act, 1888 (1), the plaintiff was not entitled

(1) By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65: "Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.*, or where such claim, though it originally exceeded 100*l.*, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding 100*l.*, it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers to order such action to be tried in any Court in which the action might have been commenced, or in any Court convenient thereto, and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly, and thereupon the plaintiff shall lodge the original writ and order with the registrar of the Court mentioned in the order, who shall appoint a day for the trial of the action, notice whereof shall be sent by post or otherwise by the registrar to both parties or their solicitors, and the action and all proceedings therein shall be tried and taken in such Court as if the action had been originally commenced therein, and the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts, and the costs of the order, and all proceedings previously thereto, shall be allowed according to the scale of costs for the time being in use in the Supreme Court."

By s. 116: "With respect to any action brought in the High Court which could have been commenced in a county court the following provisions shall apply:—

"1. If, in an action founded on contract, the plaintiff shall recover a sum less than 20*l.*, he shall not be entitled

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to any costs of the action, and refused to tax the bill. The judge of the City of London Court upheld the decision of the registrar.

The plaintiff appealed.

W. E. Hume Williams, and *Herdman*, for the appellant. Sect. 116 of the County Courts Act, 1888, has no application to actions transferred to the county court under s. 65. It was decided in *Harris* v. *Judge* (1) that a judge of the High Court had no jurisdiction to certify for costs under s. 116 when the action had been transferred from the High Court to the county court under s. 65. Sect. 116, therefore, only applies to actions which might have been commenced in the county court, but which are in fact brought and carried through in the High Court. The costs of transferred actions are provided for by s. 65. Prior to the County Courts Act, 1888, when an action in contract was commenced in the High Court, and sent down for trial to the county court, and less than 20*l.* was recovered, the county court judge had power to certify for costs: 30 & 31 Vict. c. 142, s. 5; *Taylor* v. *Cass.* (2) That power has been taken away by the County Courts Act, 1888; but instead of it, by s. 65, the costs of an action transferred to the county court

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to any costs of the action, and if he shall recover a sum of 20*l.* or upwards, but less than 50*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court, and

"2. If, in an action founded on tort, the plaintiff shall recover a sum less than 10*l.*, he shall not be entitled to any costs of the action, and if he shall recover a sum of 10*l.* or upwards, but less than 20*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court, unless in any such action, whether founded on contract or on tort, a judge of the High Court certifies that there was sufficient reason for bringing the action in that Court, or unless the High Court, or a judge thereof at chambers, shall by order allow costs. Provided that, if in any action founded on contract the plaintiff shall, within twenty-one days after the service of the writ, or within such further time as may be ordered by the High Court or a judge thereof, obtain an order under Order XIV. of the Rules of the Supreme Court empowering him to enter judgment for a sum of 20*l.* or upwards, he shall be entitled to costs according to the scale for the time being in use in the Supreme Court."

(1) [1892] 2 Q. B. 565.

(2) Law Rep. 4 C. P. 614.

"shall be allowed according to the scale of costs for the time being in use in the county courts."

Haldinstein, for the respondent, was not called upon to argue.

LORD COLERIDGE, C.J. It appears to me that in this case the appellant is wrong, and the decision appealed from is right. Whatever may have been the state of the law before 1888, I am clearly of opinion that since the County Courts Act, 1888, jurisdiction to give costs in such a case as the present does not reside in a county court judge. I waive any discussion of the history of the County Courts Acts, because, with all respect, I am not convinced by the reasoning in the case of *Taylor* v. *Cass.* (1) It seems to me an unsatisfactory decision. Of course, however, if that case were still law and the Act of Parliament remained the same as when that case was decided, I should bow to it, although I should do so with reluctance. It is, however, admitted that the Act of 1888 is inconsistent with the case of *Taylor* v. *Cass.* (1) That case is gone since the Act of Parliament itself contravenes the decision. We have, therefore, to consider the Act of 1888. That statute must be construed according to the real and ordinary sense of the words used in it. The wording of the Act, so long as it is plain, must be followed, and if unforeseen consequences should arise from our having construed the language of the Act according to its usual sense, we are nevertheless bound to put that construction upon it, and we must leave it to the legislature to correct any mistake they may have made. In the present case, however, I am unable to think the enactment under consideration either inexpedient or unwise. It appears to me to be extremely clear. The language of s. 116 is express. In the present case the action is one founded on contract, it might have been commenced in the county court, and the plaintiff has recovered less than 20*l.* Sect. 116 says in the clearest way possible that in such a case the plaintiff shall not be entitled to any costs of the action. It is no doubt contended that the proviso to sub-s. 2 of s. 116 shews that it was not intended to deprive the plaintiff of costs in every such case. But by that proviso the only person who can interfere with the universality of the enactment

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is not "a county court judge," not even "a judge"—an expression which might possibly include a county court judge—but "a judge of the High Court." It is unnecessary now to consider whether or not before the Act of 1888 a county court judge could exercise this power; it is perfectly clear now that it is only a judge of the High Court who can give a certificate under the section. All the circumstances, therefore, brought forward by way of argument are destroyed by the clear, distinct, unambiguous words of the section itself. And then it is said that the section has received judicial construction in the case of *Harris* v. *Judge*. (1) That is true; but the decision in that case does not in any way support the contention of the appellant. In that case the action in question was, as in the present case, a transferred action, and it was sought to get costs on the High Court scale by means of a certificate from a judge of the High Court, although the plaintiff had recovered less than 50*l*., but upwards of 20*l*. The Lords Justices construing s. 116 held that a judge of the High Court had no jurisdiction to grant such a certificate in a case which had been transferred, and they all concur in saying that s. 116 does apply to cases which have been transferred to the county court. If, therefore, a man chooses to bring an action on contract in the High Court which he might have commenced in the county court, he does so at the peril of losing all his costs should the case be transferred to the county court and a less sum than 20*l*. be recovered. I do not see any hardship in this. The legislature do not prevent a man from bringing such an action in the High Court, but, in order to prevent what in many cases is no doubt an oppression, they say in effect, "We cannot prevent you from bringing this action in the High Court, but if you fail it is at the risk of losing all costs." There seems to me nothing inexpedient or wrong in that. It seems to me, therefore, that we are deciding this case in direct obedience to the ratio decidendi of *Harris* v. *Judge* (1), and that this appeal must be dismissed.

CAVE, J. I am of the same opinion. The question which we have to decide is, whether the case before us is governed by s. 65 or s. 116 of the County Courts Act, 1888. Sect. 65

(1) [1892] 2 Q. B. 565.

applies to actions of contract brought in the High Court in which the claim is less than 100*l.*, and provides for such actions being upon application transferred by the order of a judge of the High Court to the county court, and it concludes with a general provision as to costs: "And the costs of the parties subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts, and the costs of the order and all proceedings previously thereto shall be allowed according to the scale of costs for the time being in use in the Supreme Court." That, as I have said, is a perfectly general provision, and I do not apprehend that there is anything to prevent the legislature from introducing an exception to that enactment. That is what they have in fact done in s. 116, which applies, not to all actions to which s. 65 applies, but only to actions "brought in the High Court which could have been commenced in a county court"—a provision which we do not find in s. 65. Sect. 116, therefore, qualifies s. 65, and engrafts upon it the provisions contained in s. 116. *Harris* v. *Judge* (1) is a clear authority for saying that s. 116 applies to actions transferred to the county court under s. 65. All the Lords Justices say that this is so. Lindley, L.J., is perhaps less express on the point than the other Lords Justices; but in the result he arrives at the same conclusion, for he agrees in the decision that the section applied in that case, which was a transferred action. The other Lords Justices expressly state their view. Kay, L.J., says: "Sect. 65 empowers a judge at chambers to transfer any actions in which not more than 100*l.* is claimed to a county court, and provides that, when the order is made, 'the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein.' The costs subsequent to the transfer are to be on the county court scale, 'and the costs of the order and all proceedings previously thereto shall be allowed' on the High Court scale. After such transfer therefrom, the judge of the High Court has no further jurisdiction in the action. As to costs, if less than 50*l.* is recovered, in my opinion s. 116 applies, and not s. 65, and only county court costs can be given as

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to any part of the action." That, therefore, amounts to a strong expression that s. 116 applies to all actions brought in the High Court which might have been commenced in the county court whether they have been transferred to the county court under s. 65 or not. If s. 116 applies to actions transferred to the county court from the High Court, then where, as in this case, the action is founded on contract, and the plaintiff recovers less than 20*l.*, he is not entitled to any costs of the action, either in the High Court or in the county court, unless he can bring himself within the proviso to the section. Lindley, L.J., no doubt, in *Harris* v. *Judge* (1), says that the county court judge in such a case would have the same power to certify that is given to a judge of the High Court; but I have some difficulty in accepting that view, and the other Lords Justices do not seem to have assented to it. However that may be, it is admitted that in this case the plaintiff did not ask for any such certificate from the county court judge. His case is that he is entitled to costs without any such order. In my opinion it is clear that, following the decision in *Harris* v. *Judge* (1), and in the absence of such an order, which the plaintiff has certainly not got, and possibly could not get from the county court judge, he is not entitled to any costs in this action.

Appeal dismissed. Leave to appeal given.

A. P. P. K.

The plaintiff appealed.

1893. March 6. *W. E. Hume Williams*, and *Herdman*, for the plaintiff, in support of the appeal. The construction put by the Divisional Court on s. 65 does not give effect to the words directing that "the action and all proceedings therein shall be tried and taken" in the county court "as if the action had been originally commenced therein." If s. 116 is examined it will be seen to be divided into three parts. First, if the plaintff recovers a sum less than 20*l.* in contract, or 10*l.* in tort, he has no costs unless the judge certifies; second, if he recovers between 20*l.* and 50*l.* in contract, or between 10*l.* and 20*l.* in tort, he gets

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only county court costs unless the judge certifies; and, third, if in contract he gets an order under Order XIV. to enter judgment for 20*l.* or upwards, he gets costs on the Supreme Court scale. It is clear that the second and third of these divisions only apply to a case tried in the High Court, so that the first part is the only one that can apply to a transferred action, and the incorporation of the provision as to a certificate shews that this part also only applies to actions tried in the High Court, as no such certificate can be given in a transferred action: *Harris* v. *Judge*. (1) In *Wilson* v. *Statham* (2), the plaintiff recovered less than 20*l.* under Order XIV. and less than 50*l.* in all, and he was held not entitled to costs on the Supreme Court scale in respect of the part of the proceedings which had taken place in the High Court. The effect of that is that he would get his High Court costs, but on a scale approximated to the county court scale. So in *Barker* v. *Hempstead* (3), the plaintiff obtained 45*l.* under Order XIV., and the balance of his claim, 3*l.*, in the county court, and was entitled to the costs of the whole action on the High Court scale. A consideration of s. 116 and of these cases shews that the section is properly carried into effect by applying it to costs in the High Court before transfer, thus leaving s. 65 to deal with the costs after transfer. If this is correct, the plaintiff would not be entitled to any costs in the High Court, but would get his costs incurred in the county court as if the action had been originally commenced there. The view taken by the Court in *Armitage* v. *Fison* (4) is in accordance with that now submitted.

Haldinstein, for the defendant. There is no difficulty in reading s. 65 and s. 116 together, and treating the latter as controlling the former. The sections occur in an Act dealing with county courts, and must have been intended to apply to actions tried in the county court, for ample provision is made by Order LXV., r. 12, for cases in the High Court in which not more than 50*l.* is recovered.

W. E. Hume Williams, in reply.

Cur. adv. vult.

(1) [1892] 2 Q. B. 565.
(2) [1891] 2 Q. B. 261.
(3) 23 Q. B. D. 8.
(4) 67 L. T. (N.S.) 415.

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1893. Mar. 14. LINDLEY, L.J., read the judgment of the Court (Lord Esher, M.R., and Lindley and Bowen, L.JJ.). This appeal raises the point left undetermined by *Harris* v. *Judge* (1). But that case turned on the same sections of the County Court Act, 1888, as have to be considered on the present occasion, and throws considerable light on their true construction. The sections are 65 and 116 of 51 & 52 Vict. c. 43.

Sect. 65 applies in terms to actions commenced in the High Court and sent for trial in the County Court. Sect. 116 applies in terms to all actions brought in the High Court which might have been brought in the county court. The two sections, therefore, are not mutually exclusive; they may both stand together so far as their subject-matter is concerned; and so far as they are not inconsistent they ought to be read together. This was the view taken in *Harris* v. *Judge*. (1) Upon the particular point which had then to be decided, the two sections could not be construed together, and s. 65 was held to prevail over s. 116; but it does not follow that the result ought to be the same in the present case.

The last part of s. 65 of the County Courts Act, 1888, says in terms what scale of costs is to be allowed in the cases to which it relates. It applies as well to plaintiffs as to defendants; but it does not say or mean that the costs which, if allowed, are to be taxed according to the scale mentioned, are in all cases to be allowed either to the plaintiff or to the defendant. Whether they are to be allowed or not and to whom depends on other sections. The section which enables the county court judge to give costs is s. 113; but as regards actions brought in the High Court, but which might have been brought in the county court, there are specific directions or rules contained in s. 116, and these specific directions or rules must be applied by the judge of the county court to whom an action brought in the High Court, but which might have been brought in the county court, is sent for trial.

This is what I said in *Harris* v. *Judge* (1), and what on reconsideration we are still of opinion is correct. The language, however, which I used in *Harris* v. *Judge* (1), was too wide,

(1) [1892] 2 Q. B. 565.

and was understood by Cave, J., to mean that the county court judge could give the certificate referred to in s. 116. We agree with him that the county court judge cannot do that, and my language to that extent ought to be corrected. The clause in s. 116 relating to the certificate or order allowing costs can only come into operation where the action is tried in the High Court.

This result was relied upon by the appellant's counsel as a ground for holding that s. 116 had no application to actions brought in the High Court, and ordered to be tried in a county court under s. 65. If the last part of s. 65 were an enactment that the costs should be allowed in all cases partly on the county court scale and partly on the High Court scale, his argument would be very strong; but if, as we think, the last part of s. 65 is only a direction as to the taxation of the costs, if any, which one party is to pay the other, the argument loses its force.

Again, it was urged that the costs referred to in s. 116 were not all the costs of the action, but only those incurred in the High Court, and that in a case brought in the High Court, and ordered to be tried in the county court under s. 65, the plaintiff might lose the costs incurred by him in the High Court, and yet recover the costs incurred by him in the county court. For this construction reliance was placed on *Armitage* v. *Fison* (1); but, with deference to the learned judges who decided that case, we think the language of s. 116, if it applies at all, is too clear and unambiguous to be confined to part only of the plaintiff's costs. In the cases to which the section applies, if the plaintiff recovers less than 20*l.* in an action founded on contract, the section says "he shall not be entitled to any costs of the action," unless he gets such a certificate as is afterwards mentioned, which in an action ordered to be tried in a county court under s. 65 the plaintiff cannot get.

For these reasons we are of opinion, (1.) that the rules laid down in clauses 1 and 2 of s. 116, depriving a plaintiff of costs wholly or partially, are applicable to all actions brought in the High Court which might have been brought in the county court, whether tried in the High Court or ordered to be tried in the

(1) 67 L. T. (N.S.) 415.

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county court under s. 65, and (2.) that those rules apply to all the costs of such actions, and not only to so much of them as, in a case ordered to be tried in the county court, have been incurred antecedently to such order.

The judgment appealed from must be affirmed, and the appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitor for appellant: *Henry Pumfrey.*

Solicitors for respondent: *Prince, Ayres, & Austen.*

A. M.

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[IN THE COURT OF APPEAL.]

IN RE NANCE. EX PARTE ASHMEAD.

Bankruptcy—Petitioning Creditor—Locus standi—Purser of Cost Book Mine—Stannaries Act, 1869 (32 & 33 *Vict. c.* 19), *ss.* 2, 13.

Sect. 13 of the Stannaries Act, 1869, provides that an unpaid call on any share in a cost book mining company shall be deemed to be a debt due from the shareholder to the company, and that, if the shareholder fails to pay the call at the appointed time, "it shall be lawful for the company to sue the shareholder for the amount of such call, in any Court of Law having competent jurisdiction, in the name of the purser for the time being of the company, as the nominal plaintiff for the company, and to recover the amount of such call":—

Held, that, when judgment has been recovered in an action by such a company, in the name of the purser as nominal plaintiff, against a shareholder for an unpaid call, the purser is not authorized by s. 13 to present a bankruptcy petition in his own name on behalf of the company against the shareholder, in respect of the judgment debt, but that the company must itself petition.

APPEAL by Edward Ashmead against an order giving leave to the appellant to amend a bankruptcy petition, which he had presented against William Nance.

Ashmead was the secretary of two cost-book mining companies in Cornwall, within the jurisdiction of the Stannaries Court, called the Great Fortune Mine and the West Carzin Mine. He was not a shareholder in either company. Nance was a shareholder in both companies, and he was in default in the payment of calls upon his shares in both companies. His

place of business being in the City of London, Ashmead, on behalf of the company, as provided by s. 13 of the Stannaries Act, 1869, brought actions against him in the Mayor's Court of London, and recovered judgments against him for 95*l.* 5*s.* 9*d.* and 40*l.* 1*s.* 6*d.* respectively. Ashmead then presented a bankruptcy petition against Nance, stating that he petitioned "as secretary for and on behalf of all the shareholders in the Great Fortune Mine, and also as secretary for and on behalf of all the shareholders in the West Carzin Mine."

The petition contained the following allegation: "The said William Nance is justly and truly indebted to me as secretary for and on behalf of all the shareholders in the Great Fortune Mine, and also as secretary for and on behalf of all the shareholders in the West Carzin Mine, in the sum of 135*l.* 7*s.* 3*d.*, the amount due on two final judgments obtained by me as secretary for and on behalf of all the shareholders in the Great Fortune Mine, and as secretary for and on behalf of all the shareholders in the West Carzin Mine, in the Mayor's Court, London, dated November 23, 1892."

The registrar declined to make a receiving order, on the ground that the judgments did not make the debts due to Ashmead, so that he could petition in respect of them, or that, at any rate, he was a bare trustee for the companies, and could not petition without joining the beneficiaries. Liberty was given to the petitioner to amend the petition.

Cooper Willis, Q.C., for the appellant. The appellant, as secretary of the companies, is authorized by s. 13 (1) of the

(1) 32 & 33 Vict. c. 19, s. 2: "The term 'purser' means the purser for the time being of a company, and if there is no purser, then the secretary for the time being."

Sect. 13: "The amount for the time being unpaid of any call made after the passing of this Act on any share in a company, shall be deemed to be a debt due from the holder of such share to the company, and if at the time appointed by the company for the payment of any such call, any shareholder shall fail to pay the amount thereof, it shall be lawful for the company to sue such shareholder for the amount of such call, in any Court of Law having competent jurisdiction, in the name of the purser for the time being of the company, whether such purser is a shareholder in the company or not, as the nominal plaintiff for the company, and to recover the amount of such call, together with interest for the same and costs of suit."

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Stannaries Act, 1869, to sue as nominal plaintiff on behalf of the companies for unpaid calls on shares, and he recovered the judgments in that character, and, as the judgment creditor, he is entitled to petition in bankruptcy against the judgment debtor. The judgment debts are due to the secretary for and on behalf of the companies. It is true that in general a bare trustee of a debt cannot petition in bankruptcy against the debtor without joining his cestui que trust as co-petitioner: *Ex parte Dearle* (1); *Ex parte Culley* (2); but the rule is not inflexible. The Court has a discretion.

[BOWEN, L.J. Is there any debt due to the secretary? Is not the debt due to the company?

LORD ESHER, M.R. *Guthrie* v. *Fisk* (3) shews that, if by statute power is given to a company to sue in the name of its secretary as nominal plaintiff, this does not enable the secretary to petition in bankruptcy on behalf of the company against a debtor to the company.]

In that case no judgment had been recovered, and there was no debt due to the secretary. Here the call is merged in the judgment, and the secretary holds the judgment for the purpose of enforcing it. In *Hope* v. *Meek* (4), *Guthrie* v. *Fisk* (3) was commented on. Proceedings upon the judgment must be taken in the name of the plaintiff in the action—that is, the secretary. He would be the proper person to give a receipt for the judgment debt.

F. Cooper Willis, for the debtor, was not called upon.

LORD ESHER, M.R. The debtor was a partner in a mining company subject to the jurisdiction of the Stannaries Court. The company made a call upon his shares, and he failed to pay it. At common law the company could not sue him for the amount of the call, because he was a partner with them. This inability of the company to sue a shareholder had caused great difficulty in the enforcing of calls upon shares in companies subject to the Stannaries Court, and the Act of 1869 was passed to cure this difficulty. The Act gives power to a cost-book company to

(1) 14 Q. B. D. 184.
(2) 9 Ch. D. 307.
(3) 3 B. & C. 178.
(4) 10 Ex. 829.

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sue a shareholder who has neglected to pay a call on his shares. This is a purely statutory right depending solely on the provisions of the Act. The right is established and is limited by the terms of s. 13. It is quite clear that the call was not due to the secretary of the company. No debt was due from the shareholder to the secretary, and in the present case the secretary was not even a partner in the company; he had no interest whatever in the matter. The right to sue the shareholder is conferred by s. 13. The first thing it does is, to make the unpaid call a debt due from the shareholder. To whom? To the company. That which before was not a debt at all is made a debt due from the shareholder, not to the purser or secretary, but to the company. Then the right to sue for the debt is given in express terms, not to the purser, but to the company. The right is given to the company, and is limited to them, and they alone can sue for the debt. How are they to sue? "In the name of the purser as the nominal plaintiff for the company." What remedy the company might have had in a Court of Equity I do not know; but the right given by s. 13 is, to sue the shareholder "in any Court of Law having competent jurisdiction." When it is said that the company may sue, it is meant that the purser may not. But the company are to sue in the name of the purser "as the nominal plaintiff." The action is to be brought by the company. The section does not say that the action is to be by the purser as plaintiff, but that the company are to sue in the name of the purser, as the nominal plaintiff. The company are to sue, and the company are to recover the amount. The debt is not due to the purser, and the action is not brought by him. The judgment is not in his favour; it is in favour of the company. The purser is not the judgment creditor; the company are clearly the judgment creditors. If a petition in bankruptcy is founded on the judgment, the company must be the petitioners. The purser or secretary could not be a good petitioning creditor. In this case the secretary has presented the petition, and he describes himself as having recovered the judgments "for and on behalf of all the shareholders." That statement is not true; the company or the shareholders had recovered the judgment in his name. It is impossible for him to be a proper petitioning

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creditor, or to make the proper affidavit in support of the petition. So far as the bankruptcy law is concerned, he is nothing but a name. The point, I think, was really decided in *Guthrie* v. *Fisk* (1), which shews that, when an Act confers a limited power upon a company to sue in the name of their officer, it does not thereby make that officer a good petitioning creditor in bankruptcy on behalf of the company.

I think the registrar took the right view of the law; and it seems to me to follow the grammatical construction of s. 13. The appeal must be dismissed.

LINDLEY, L.J. The question turns upon the true construction of s. 13 of the Stannaries Act. One of the objects of that Act was to cure the great defect, which was well known to all lawyers, in the mode of recovering unpaid calls from shareholders in cost-book mining companies within the jurisdiction of the Stannaries Court. These companies were unincorporated partnerships, and, before the Act, there were only two methods of enforcing the payment of a call by a defaulting shareholder. One method was for the purser to sue the shareholder on the equity side of the Stannaries Court. In such a suit he did not recover the amount of the call, but he obtained an order for the sale of the shares, if the shareholder did not pay the call. The other method—a very crooked one—was what was locally called "putting a creditor upon" the shareholder—that is, procuring some merchant who was a creditor of the company to sue the defaulting shareholder for the debt due by the company to the creditor. This was an experiment which generally succeeded; for the shareholder could only plead the non-joinder of all the other shareholders. This method often led to suits in Chancery to put a stop to such proceedings, which were frequently very unjust.

To cure this state of things, s. 13 of the Stannaries Act was passed in 1869. The section does not go the length of enabling cost-book companies to sue and be sued in the name of the purser in every case. The company cannot be sued at all in the name of the purser, and the purser cannot sue on behalf of the company for anything but unpaid calls. But what is the extent of

(1) 3 B. & C. 178.

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the power given by s. 13? Is the company authorized to use the name of the purser in proceedings in bankruptcy against a defaulting shareholder? The answer must be, No. The principle to be applied was laid down in *Guthrie* v. *Fisk* (1), which decided, that an Act which enabled a company to sue in the name of their officer did not authorize the officer to take proceedings in bankruptcy on behalf of the company against a debtor to the company. That principle applies here, and I think the decision of the registrar was quite right.

BOWEN, L.J. I am of the same opinion.

Appeal dismissed.

Solicitors: *Stacpoole, Batters & Co.; Howard Rumney.*

W. L. C.

[IN THE COURT OF APPEAL.]

C. A. 1893 *March* 17, 28.

IN RE HUGHES. EX PARTE HUGHES.

Bankruptcy—Act of Bankruptcy—Assignment of Debtor's Property to Trustees for benefit of Creditors generally—Exception of Leaseholds—Declaration of Trust of Leaseholds—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*a*).

A debtor executed a deed by which he granted and assigned all his property (except leaseholds) to trustees, on trust for realization and division among all his creditors as in bankruptcy. And by the same deed the debtor declared that he would stand possessed of all leaseholds in trust for and to convey and assign the same as the trustees should from time to time direct:—

Held, by the Court of Appeal (Lindley, L.J., and Lopes, L.J.), Lord Esher, M.R., dissenting, that this deed was, within the meaning of sub-s. 1 (*a*) of s. 4 of the Bankruptcy Act, 1883, a conveyance or assignment of the debtor's property to trustees for the benefit of his creditors generally, and that its execution was therefore an act of bankruptcy.

In re Spackman (24 Q. B. D. 728) considered.

APPEAL by Richard Hughes against the refusal of a Divisional Court (Vaughan Williams and Collins, JJ.), to set aside a receiving order made by the registrar of the Swansea County Court against the appellant.

The ground of the appeal was, that the appellant had not

(1) 3 B. & C. 178.

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committed the act of bankruptcy alleged in the bankruptcy petition.

The act of bankruptcy alleged was the execution by the debtor of a deed dated June 13, 1892. This deed was made between the debtor, of the first part; D. R. Knoyle and William Bennett (who, and the survivor of them, and the executors or administrators of such survivor, were thereinafter called the trustees), of the second part; and the several persons and firms executing the deed in the schedule thereunder written, of the third part. The deed contained a recital that the debtor was justly indebted to the several persons and firms parties thereto of the third part (and who were creditors of the debtor) in the sums of money set opposite their respective names in the schedule thereto, and had proposed and agreed to convey and assign all and singular his property and effects unto the trustees, upon the trusts and in manner thereinafter mentioned for the benefit of his creditors, and the several persons and firms had agreed to release him from their debts as thereinafter appeared. And, in consideration of the premises, the debtor, as beneficial owner, did thereby grant and convey unto the trustees all and every his freehold and copyhold messuages, lands, and tenements, and all other his hereditaments and premises whatsoever and wheresoever situate, except leaseholds, to hold the same unto and to the use of the trustees, their heirs, executors, administrators, and assigns, according to the several tenures thereof, upon the trusts thereinafter declared concerning the personal estate of the debtor. And for the same consideration the debtor, as beneficial owner, did thereby assign unto the trustees all and every the stock-in-trade, goods, chattels, wares, merchandises, household furniture, fixtures, plate, linen, china, book and other debts, sums of money, and securities for money, books of account, vouchers and documents, with all other his personal estate, except leaseholds, to hold the same unto the trustees upon the trusts therein declared. Those trusts were to sell and convert into money, and to call in and collect debts; out of the proceeds of sale, &c., to pay expenses of sale, &c., and costs, charges, and expenses; then to pay all claims which would by law be entitled to be paid in priority in case of bankruptcy; and then to divide the residue rateably

among all the creditors of the debtor. In consideration of the conveyance and assignment thereinbefore contained the parties thereto of the third part respectively released the debtor, and his estate and effects, from all debts and claims which they respectively had against him or his estate or effects. Provided always, and it was thereby declared, that the debtor should stand possessed of all leaseholds and leasehold interests in trust for and to convey and assure the same as the trustees should from time to time direct.

There was a proviso that in case a receiving order should be made against the debtor within three calendar months after the date of the deed, the release thereinbefore contained should be void.

There was evidence that the value of the whole of the debtor's property was 3625*l.*, and that the value of the leaseholds was 925*l.*

The Registrar held that this deed was, within the meaning of s. 4, sub-s. 1 (*a*) of the Bankruptcy Act, 1883, "a conveyance or assignment of the debtor's property to trustees for the benefit of his creditors generally," and, therefore, an act of bankruptcy.

The Divisional Court were of opinion that this conclusion was justified by a long line of authorities, and that the decision of the Court of Appeal in *In re Spackman* (1) was not inconsistent with those authorities, and they accordingly affirmed the order of the Registrar.

The debtor, with the leave of the Divisional Court, appealed.

March 17. *Cooper Willis, Q.C.*, and *F. Cooper Willis*, for the debtor. The execution of the deed was not an act of bankruptcy. It was not a "conveyance or assignment" of the debtor's property within the meaning of sub-s. 1 (*a*) (2) of s. 4 of the Bankruptcy Act, 1883. It must be a conveyance or assignment of the whole, or substantially the whole, of the

(1) 24 Q. B. D. 728.

(2) By sub-s. 4 (1): "A debtor commits an act of bankruptcy in each of the following cases (inter alia).

"(*a*) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.

"(*b*) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof."

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debtor's property. In the present case there was a substantial exception, viz., the leaseholds, the value of which is about one-fourth of the whole value of the debtor's property. The word "assignment" must be construed strictly, and in this case there was no assignment of the leaseholds to the trustees. There was a declaration of trust of the leaseholds by the debtor, and a declaration of trust is not an "assignment" within sub-s. 1 (*a*): *In re Spackman.* (1) Under the law of bankruptcy, as it stood before the Bankruptcy Act, 1869, an assignment of the whole of a debtor's property to trustees for the benefit of his creditors was held to be an act of bankruptcy, because it was presumed that in executing such a deed the debtor must have had an intention of committing a fraud upon the bankruptcy law. The law was not based on actual fraud: *Ex parte Bourne.* (2) In sub-s. 1 of s. 6 of the Bankruptcy Act, 1869, which corresponds to sub-s. 1 (*a*) of s. 4 of the Bankruptcy Act, 1883, the words "with intent to delay his creditors," which had been inserted in former Bankruptcy Acts, were omitted; but this omission has not altered the law: *In re Wood.* (3)

Herbert Reed, Q.C., and *Cluer*, for the petitioning creditors. According to the ordinary practice of conveyancers, leaseholds are never assigned to trustees. Trustees would never be willing to make themselves liable to perform onerous covenants. A declaration of trust is the method always adopted for giving to trustees the beneficial interest in leaseholds; and, when the trustees sell the leaseholds, the person who has declared himself a trustee of the leaseholds is bound to assign them to the purchaser. The recital in the deed in the present case shews that the debtor's intention was to assign all his property to the trustees for the benefit of his creditors; and, though a declaration of trust of leaseholds is not strictly speaking an "assignment," it is an "assignment" within the meaning of sub-s. 1 (*a*) of s. 4. But the object and the effect of the deed were to deprive the debtor of the whole of his property, and to give it to the trustees for the benefit of the creditors generally, and the execution of such a deed has always been held to be an

(1) 24 Q. B. D. 728. (2) 16 Ves. 148.
(3) Law Rep. 7 Ch. 302.

act of bankruptcy, and the decisions since the Bankruptcy Act, 1869, have followed the decisions before that Act. There is no substantial exception in the present case—nothing which would enable the debtor to carry on his trade: *Young* v. *Fletcher*. (1) The debtor retained no beneficial interest in the leaseholds. In *In re Spackman* (2), the debtor had not executed any deed, and, when the Court said that a declaration of trust would not be an "assignment" within the meaning of sub-s. 1 (*a*) of s. 4, it was a mere obiter dictum. There was clearly no "assignment" in that case.

Cooper Willis, Q.C., in reply.

Cur. adv. vult.

March 28. The following judgment of LORD ESHER, M.R., was read by LINDLEY, L.J. In *In re Spackman* (2), the Court thought itself bound, in the first place, to construe s. 4, sub-s. 1 (*a*) of the Bankruptcy Act, 1883, and then to apply it to the facts of the case. The Court first determined the rule of construction, and held that it was to be a rule of strict construction, because it dealt with an enactment casting an incapacity of managing his own affairs upon the person to be declared a bankrupt. As a result of this rule of construction the Court held that the words "conveyance or assignment" of the debtor's property must be confined to such an act as in ordinary legal language would amount to a conveyance or assignment of the property dealt with, and that a contract or covenant to deal with property in a particular way, or a declaration of trust affecting property in a particular way, are not in ordinary legal language a conveyance or assignment of that property. This construction of the section was the foundation of the judgment elaborately reasoned by Fry, L.J., and clearly stated, I think, by Lopes, L.J., and myself. It was further stated, or was the necessary result of the rule of construction relied on, that the whole of the debtor's property must be dealt with by such an assignment or conveyance as was described in the judgments. I cannot retract from the rule of construction, or the consequent construction of the section, determined in that case. Applying that rule and

(1) 34 L. J. (Ex.) 154. (2) 24 Q. B. D. 728.

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that construction to the present case, it seems to me that, although a part of the property of the debtor was, within the meaning of the section, "assigned or conveyed," yet that a material, substantial part was not so assigned or conveyed, and, therefore, that the only act of bankruptcy relied upon before us to support the receiving order was not made out. It is not enough to say that the debtor dealt with the whole of his property; it is necessary to make out that he dealt with the whole of it by assigning or conveying the whole of it. I think the appeal ought to be allowed.

LINDLEY, L.J., read his own judgment, as follows:—The only question is, whether this deed is a "conveyance or assignment" of the debtor's property to trustees for the benefit of his creditors generally. The appellant contends that it is not, because the leaseholds are not conveyed or assigned, and he relies on *In re Spackman* (1) as an authority in his favour. I will first consider the question apart from that authority, and I will then examine the authority itself. The statute speaks of a conveyance or an assignment to trustees, and those words have to be applied to all kinds of property. What is their meaning when applied to property which in practice is seldom, if ever, conveyed or assigned to trustees in the strict technical sense? Are the words to be construed as extending to and as including the various methods of dealing with such property to which conveyancers usually have recourse, although such methods are not conveyances or assignments in the proper sense of those terms? Or are the words in question to be construed strictly in their proper sense, so as to exclude their equivalents in a business point of view? I cannot think that the latter can be their proper construction. In order to protect trustees from the burdens which would be imposed on them by an assignment of leaseholds, conveyancers seldom, if ever, assign leaseholds to trustees. They have recourse to a declaration of trust, instead of an assignment. The same mode of dealing with them is adopted when leaseholds cannot be assigned without the licence of the lessor, and his licence cannot readily be procured. Any conveyancer,

(1) 24 Q. B. D. 728.

instructed to prepare a conveyance or assignment by a debtor of all his property to trustees for the benefit of his creditors, would draw the deed in the form most appropriate to the various kinds of property to which the deed was intended to apply. A properly drawn deed for such a purpose would contain a grant of the debtor's freehold property, a covenant to surrender his copyhold property (if he had any), an assignment of his debts, stocks, funds, and securities, and a covenant or trust binding him to deal with his onerous property—i.e., his leaseholds and shares liable to calls—as the trustees should direct. Such a deed in such a form would, in my opinion, clearly be in ordinary legal parlance a conveyance or assignment by the debtor of his property to trustees for the benefit of his creditors, although, if its various parts were analysed, it would be found that the legal estate in some of the property still remained in the debtor. I cannot entertain a doubt that such a deed in such a form would answer the description of a "conveyance or assignment" within the true meaning of those words as used in s. 4, sub-s. 1 (*a*), of the Bankruptcy Act, 1883. Nor can I entertain a doubt that the deed executed by the debtor in the present case is a conveyance or assignment within that clause of the statute.

But then it is said that *In re Spackman* (1) is inconsistent with this view. I cannot so regard it. In that case there was nothing whatever which, by any stretch of imagination, could be regarded as a conveyance or an assignment in any sense whatever. An attempt was made to spell out of some correspondence a trust for creditors, and the Court held that, if there was enough to create such a trust, yet there was no such conveyance or assignment as was contemplated by s. 4, sub-s. 1 (*a*), of the Bankruptcy Act, 1883. The Court was not considering the meaning of conveyance or assignment as applied to leasehold property, and although there were some observations to the effect that a mere declaration of trust is not a conveyance or assignment within the meaning of the enactment in question, I cannot think that those observations were intended to apply, or ought to be treated as applying, to a formal conveyance or assignment by a debtor of all his property, except leaseholds, to trustees for the benefit of his creditors, and

(1) 24 Q. B. D. 728.

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a covenant or declaration of trust by which his leaseholds are to be held and disposed of for their benefit also. The decision itself was, in my opinion, quite right; but to decide that this deed is not an act of bankruptcy, and to hold that *In re Spackman* (1) compels the Court so to decide, would, in my opinion, be quite wrong.

I have purposely hitherto refrained from alluding to the law as it stood before 1869. But it is clear that the execution by a trader of such a deed as this would have been an act of bankruptcy by him before 1869. In the Bankruptcy Act of that year a section was introduced, similar in terms to s. 4, sub-s. 1 (*a*), in the present Act, and from 1869 to the present time the execution of such a deed as the present was always regarded as an act of bankruptcy. See *In re Wood.* (2) I regard the present appeal as an experiment, made to induce the Court to hold that a deed, which has been regarded as an act of bankruptcy ever since bankruptcy laws have existed, is not to be so regarded any longer. I can find no trace of any intention to alter the law to this extent. The experiment has very likely been encouraged by some of the observations in *In re Spackman* (1), which was decided in 1890; but, in my opinion, the experiment ought to fail. The appeal ought, I think, to be dismissed with costs.

LOPES, L.J., read the following judgment. This case is distinguishable from *In re Spackman.* (1) There was in that case no instrument under seal, no "conveyance," no "assignment," in any sense of those words; here there is an instrument under seal, there is an "assignment." But there are observations in that case, to which I was a party, which, it is said, were unnecessary for the decision of that case, and which go too far. It is said that those observations put too strict an interpretation on the words "conveyance" and "assignment." After a very careful consideration of the matter, I have come to the conclusion that the Court in that case did put too strict, too narrow, an interpretation upon those words. I think they ought to be construed with reference to the particular property to be dealt with, and by

(1) 24 Q. B. D. 728. (2) Law Rep. 7 Ch. 302.

the light of the language and practice of conveyancers. If instructions were given to a competent conveyancer to convey and assign all the property of this debtor to a trustee for the benefit of his creditors, part of that property being leaseholds subject to onerous covenants, or subject to a provision against assignment without the licence of the landlord, he would prepare an instrument similar to the deed in the present case, which he would call an assignment. If we were to hold this document not to be an "assignment" within the meaning of s. 4, sub-s. 1 (*a*), of the Bankruptcy Act, 1833, we should be holding that a deed in the most effectual manner denuding, and intended to denude, the debtor of all his property was not an act of bankruptcy. This would be a reaction in the bankruptcy law, which I cannot think was contemplated by the legislature. A conveyance of all the property of a debtor to trustees for the benefit of his creditors generally has always been held to be an act of bankruptcy within the words of the former Bankruptcy Acts equivalent to sub-s. 1 (*b*) of this s. 4. It was said that, although in so doing the debtor did not intend to defeat or delay his creditors, yet, it being the necessary consequence of his act, he must in law be taken to have intended it. He was depriving himself of the power of carrying on his trade, and was putting his property into a course of distribution different from that which would take place under the bankruptcy law. I think it was to get rid of this somewhat forced inference that the mere conveyance or assignment of all the property of a debtor to a trustee for the benefit of his creditors generally was made an independent act of bankruptcy. I cannot think it was intended to alter the law to the extent that it would be altered, if a debtor were permitted by deed to divest himself of all his property in the most effectual way, having regard to the nature of the property, and still not bring himself within the bankruptcy law.

In my opinion, the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Thomas, Metcalfe, & Sharpe, for R. T. Leyson, Swansea; Robbins, Billing & Co., for Daniell & Thomas, Camborne.*

W. L. C.

1893
Jan. 24.

HARE *v.* ELMS AND OTHERS.

Landlord and Tenant—Lease—Re-entry—Relief against Forfeiture—Parties necessary on Application for Relief—Original Lessee—The Common Law Procedure Act, 1860 (23 & 24 *Vict. c.* 126), *s.* 1.

In an action of ejectment, brought under a proviso in a lease for re-entry for non-payment of rent, the lessor recovered judgment against the tenants in possession, and obtained possession of the demised premises. Subsequently mortgagees by way of underlease applied for relief against the forfeiture, under s. 1 of the Common Law Procedure Act, 1860, but did not make the original lessee a party in the application :—

Held, that relief ought not to be given in the absence of the original lessee.

APPEAL from chambers on a summons for relief against forfeiture of a lease for non-payment of rent.

On July 7, 1880, Newman granted a lease for ninety-nine years of nine houses and some land to Siler. The lease contained the usual power of re-entry for non-payment of rent. After sub-leases of the property to various persons, in 1891 part of the property comprised in the lease was sub-let for the residue of the term, less three days, to Mears, who subsequently granted a further sub-lease of one of the houses by way of mortgage to the applicants, the No. 3 Borough of Lambeth Permanent Building Society. In 1892, the rent being in arrear under the lease, the plaintiff, who was then assignee of the reversion expectant on the determination of the lease, brought an action against the tenants in possession claiming to recover possession of the property comprised in the lease, under the proviso for re-entry. Neither the original lessee, nor the applicants, nor any intermediate sub-lessees were made parties to the action. The defendants did not appear to the writ, and the plaintiff obtained judgment by default of appearance; and execution having been issued, obtained possession on June 30, 1892. The applicants alleged that on September 8, 1892, after execution had been issued, they became aware, for the first time, of the action and judgment. On December 5, 1892, they took out a summons for relief under the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 1. Siler, the original lessee, was not brought before the Court on the summons.

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A master at chambers having refused to grant relief, the applicants appealed, and Barnes, J., referred the matter to the Divisional Court.

T. W. Chitty, (*F. Newbolt* with him), for the applicants. The master's decision was wrong. The Courts of Chancery, before the statutes affecting the subject were passed, granted relief after judgment and execution in ejectment, and granted it to under-lessees: *Webber* v. *Smith* (1); *Berney* v. *Moore*. (2)

[DAY, J. In those cases the original lessee was before the Court.]

It is submitted that the absence of the original lessee makes no difference. By s. 1 of the Common Law Procedure Act, 1860, the Courts of Common Law are empowered to grant the same relief as the Courts of Chancery could, and no new lease of the premises need be granted. The application here is under that section. The applicants ask that the lease, and the covenants contained in it, may be revived as against the original lessee. Under the old statute, 4 Geo. 2, c. 28, s. 4 (the provisions of which were substantially re-enacted by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 210), the Courts of Common Law granted relief, in the absence of the original lessee, to a mortgagee by way of under-lease: *Doe* d. *Whitfield* v. *Roe* (3), and to an under-lessee: *Doe* d. *Wyatt* v. *Byron*. (4) Under those statutes relief could only be given by staying proceedings in the action of ejectment before judgment and execution; but the Common Law Procedure Act, 1860, s. 1, does not alter the right of the applicant to relief against a forfeiture for non-payment of rent, although the original lessee be not brought before the Court. The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14, does not apply to forfeiture or relief for non-payment of rent.

F. Gover, for the plaintiff in the action of ejectment. The applicants here are under-lessees of an under-lessee, and as such have no right to relief under s. 1 of the Common Law Procedure Act, 1860. There is a distinction in this respect between

(1) 2 Vern. 103.
(2) 2 Ridg. 310.
(3) 3 Taunt. 402.
(4) 1 C. B. 623.

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the right of a tenant to a stay of proceedings before judgment and execution in the action of ejectment, and his right to relief after. An under-lessee of an under-lessee has no equitable right as against the original lessee; his right is only as against the person who has granted him his under-lease. Where the lease has been determined, as it has been here, by judgment and recovery of possession in ejectment, the liability of the original lessee upon the covenants cannot be revived against him without his being made a party to the application for relief, and having the opportunity of being heard. *Doe* d. *Wyatt* v. *Byron* (1) and *Doe* d. *Whitfield* v. *Roe* (2) were decided before the Common Law Procedure Act, 1860, was passed, and have no application to a case in which the lease has been determined. In *Webber* v. *Smith* (3) the lessee was brought before the Court.

T. W. Chitty, replied.

DAY, J. This case raises the question whether relief against a forfeiture for non-payment of rent can be given to under-lessees who seek relief as against their landlord, and incidentally no doubt as against the original lessee, but who do not bring the original lessee before the Court. The applicants for relief seek to have the liability of the original lessee under the lease restored without giving him an opportunity of being heard. We have to determine whether such an application ought to be granted or not. Now, I do not propose to base my judgment upon the statutory rights of the lessee or under-lessees. I intend to deal with the question in a broader sense, and simply to consider whether the relief which is sought can be given—whether at law or in equity and whether under statute or not under statute—in the absence of the original lessee. This was a lease for a long term which, after various underleases, found its way, as to a certain portion of the term, into the hands of a building society, who are under-lessees by way of mortgage. The property has been parcelled out among several occupiers, and the ground rent became in arrear. The lessor thereupon brought an action of ejectment, and recovered judgment and obtained execution in

(1) 1 C. B. 623. (2) 3 Taunt. 402.
(3) 2 Vern. 103.

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ejectment. He has therefore done all that in him lay to enforce a forfeiture, and he is in possession now. The present applicants say that they had no notice of the proceedings, and that they come within the statutory period for relief. Very likely they may be entitled to the remedy they seek. I am far from saying they are not entitled to it. But, whatever remedy they have, it seems clear to me that they must enforce it in a proper manner. They must bring the proper parties before the Court, or give some good excuse for not having done so. In my judgment this question must be treated historically, and must turn upon what was the original principle applied, and the practice adopted, before the recent statutes. At law for a great length of time it was undoubtedly the habitual practice of the Courts to restrain actions of ejectment brought to enforce a forfeiture for non-payment of rent, upon the defendant bringing the rent into Court. When that was done the Courts would not allow an action to enforce the forfeiture to proceed to its final conclusion. The Courts treated the landlord's power of forfeiting the lease for non-payment of rent merely as a security for the payment of the rent, and it was their habitual practice to stay proceedings in an action of ejectment where the rent was brought into court pending the action.

The remedy was afterwards made more clear and defined more precisely by statute. The 4 Geo. 2, c. 28, s. 2, relieved the plaintiff in ejectment from the necessity of proving a formal demand for the rent upon the day it became due, and provided, in effect, that if the rent, arrears, and costs were paid before judgment and execution then the execution should not proceed. Those provisions were substantially re-enacted in the Common Law Procedure Act, 1852, s. 210. In the Common Law Procedure Act, 1860, s. 1, there are further provisions for simplifying the remedy in the Courts of Common Law by enabling them, in the case of any ejectment for a forfeiture for non-payment of rent, to give the same relief as had been given by the Courts of Equity. Now the Courts of Equity had done more than the Courts of Common Law. They gave relief where the forfeiture was complete after judgment and execution in ejectment, if the tenant brought full compensation into court, and they ordered a new lease to be

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executed similar to the old lease, and for that purpose of course they had before them the lessee. They could not grant that relief without having the parties to the lease before them; there is no instance in which a Court of Equity has ordered a new lease to be executed where the person who was to take the lease was not before the Court. The ordinary applicant for relief no doubt was the original lessee. Applications by under-lessees and mortgagees are comparatively not very numerous. The ordinary applicant has been the original lessee, but he has always been, as far as I can find out, an essential party. In the argument for the applicants for relief in the present case great reliance was placed upon the answers given by the judges in the Irish case of *Berney* v. *Moore*. (1) Those answers were given in reference to the questions put to the judges, and the questions must be taken to have been put in reference to the facts of the case. The lessee there was before the Court, and they thought it fair and reasonable that he should execute the lease, and directed him to do so. It was executed no doubt for the benefit of the under-lessee, but with the privity of the lessee who was before the Court. At law the theory formerly was that the old lease was gone when ejectment was brought, and so the Courts of Equity required that a new lease should be executed in order to set up the old one. The legislature, in passing the Common Law Procedure Act, 1860, thought that the best way of setting up the old lease was to give the Courts authority to declare that it should be set up; but no substantial change in the remedy or procedure was effected by the enactment; all that was done was to dispense with the trouble and expense of having a new lease drawn up, and to relieve the parties from the payment of the burdensome stamp duties upon the new lease. If before the statute was passed it was necessary that all the parties interested in the lease should be before the Court, it is so now. In *Doe* d. *Whitfield* v. *Roe* (2) judgment in ejectment was obtained by the lessor and execution issued, and there was no doubt that the lease was forfeited and gone. But after a time the mortgagee of the lease from the original lessee came and asked for relief, saying that he had never heard of the proceedings in

(1) 2 Ridg. 310. (2) 3 Taunt. 402.

ejectment. The Court granted a rule, which was afterwards made absolute, giving to the mortgagee that which he asked, namely, to be put into possession of the land upon paying the rent in arrear and costs. He shewed that he was entitled to possession as between himself and the lessor. The Court, after hearing the lessor, put the mortgagee into the same position as if there had been no forfeiture, but gave him no rights as against the lessee. All that the case decided was that the mortgagee had the same right to relief against forfeiture for non-payment of rent as the lessee against whom recovery had been had. In *Doe* d. *Wyatt* v. *Byron* (1) there was no judgment in ejectment at all. The defendants, who were under-lessees of the term less two days, appeared to the writ as soon as they heard of it, and before judgment, and asked the judge to exercise his jurisdiction by allowing them to pay the rent and costs into court at once. They asked to be allowed to pay the rent and costs into court before judgment and execution took place, and asked for a stay of proceedings upon payment of the rent and costs under 4 Geo. 2, c. 28. The judge allowed that to be done, and under his direction the rent and costs were paid to the lessor. Everybody therefore remained in the same position as they always had been. The judge's decision was upheld by the Court. That case, however, is no authority for the proposition that an under-lessee has a right to deal with the matter in the absence of the original lessee. The lessees there were not necessary parties at all. The lease had never been determined; there had been no judgment or entry in ejectment. The application was to stay proceedings, not to set up a lease which had determined. In the case before us we are asked to set up against the original lessee a lease which has determined, and the lessee is not before the Court. He may have a very strong interest in the matter, and may have many equities to set up against an attempt by under-lessees or mortgagees to saddle him with a renewal of the lease. He has been relieved from this lease through the failure of somebody to pay the rent. It may well be that the lessee, if he was before the Court, could shew

(1) 1 C. B. 623.

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Day, J.

good cause why the lease should not be set up against him, and why he should not have re-imposed upon him the burden of the covenants from which he has been relieved. It is not suggested that he has acted fraudulently in the matter as against the building society. For these reasons I am of opinion that the lessee ought to be before the Court, and that in his absence this application ought not to be granted.

COLLINS, J. I am of the same opinion. This application is made by mortgagees of a sub-lessee, and it is made in the absence of the original lessee. The point has been taken that a sub-lessee, or a mortgagee of a sub-lessee, is not within s. 1 of the Common Law Procedure Act, 1860, and that is said to be an answer to the whole case. It is not necessary to decide that point. I think that it is substantially met by Henn, J., in *Berney* v. *Moore*. (1) He came to the conclusion that under-tenants were entitled to apply for relief under the old statutes, 11 Anne, c. 2 (Irish) and 4 Geo. 1, c. 5. But, as I have said, it is not necessary to decide that point here, because I am of opinion that the original lessee is a necessary party to these proceedings. Sect. 1 of the Common Law Procedure Act, 1860, gives the Courts of Common Law the same jurisdiction to give relief, in the case of ejectment for a forfeiture for non-payment of rent, as was exercised by the Court of Chancery. Prior to that time the Courts of Common Law had no such jurisdiction. They could intervene to stay proceedings before execution at the instance of a lessee, and it may be of a sub-lessee; but if judgment had gone they could do nothing, and the person seeking relief had to go to the Court of Chancery. Now, the Courts of Equity formerly appear to have proceeded, where relief was granted, by granting a new lease. The application came after forfeiture, and therefore, after the first lease had determined. That, of course, involved the presence, as one of the parties, of the person to take the lease. That mode of procedure, however, was thought inconvenient, and the legislature therefore made provision that it was competent to the Courts to say that the old lease should be deemed to continue; but the

(1) 2 Ridg. 310.

alteration of the procedure imposed the same burden as before. It involved the super-imposition upon the person who had got rid of the lease of the covenants and obligations of the lease, which had determined by reason of the forfeiture. The lessor was bound to accept the tender of rent because, as has been pointed out, the forfeiture clauses were looked upon merely as security for the payment of the rent, and the lessor, when the rent was paid, had nothing further to say in the matter. He could not then resist having the lease and the tenant re-imposed upon him. But there was another person—the first lessee—who might have a great deal to say. He may have got rid of his liability under the lease without having made any default of his own. He may have relied, and properly relied, upon somebody else to perform his covenants. The forfeiture may have been incurred without his knowledge, and he may have—in this case we do not know that he has not—very good reasons to urge why the liability to perform the covenants and conditions of the lease should not be re-imposed upon him. I do not think we can say that that liability should be re-imposed upon him without his having a right to be heard in the matter. No authority has been cited to shew that such a thing was ever done in the Courts of Equity; but it is said that two cases, decided in the Courts of Common Law before the equitable jurisdiction was extended to those Courts, establish that relief can be given in the absence of the first lessee. The first of these cases, *Doe* d. *Whitfield* v. *Roe* (1) is, I think, distinguishable for the reasons given by my brother Day, and also for the reason that, if it decided what was contended for by counsel for the applicants here, it would affirm the proposition that the Courts of Common Law had, before the Common Law Procedure Act, 1860, the jurisdiction which was extended to them by that Act—namely, to deal with applications for relief after judgment and execution in ejectment—and that s. 1 of the Common Law Procedure Act, 1860, was therefore unnecessary. In the second case *Doe* d. *Wyatt* v. *Byron* (2) the application was only to stay proceedings before judgment. It does not, therefore, touch the point in question here. I am therefore of opinion that the relief asked for should not be given in the

(1) 3 Taunt. 402. (2) 1 C. B. 623.

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absence of the first lessee; and, no reason having been given by the applicants for not making him a party to the proceedings, this application should be refused.

Appeal dismissed.

Solicitors for applicants: *Wyatt & Co.*

Solicitors for plaintiff: *Henry Gover & Son.*

W. A.

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Feb. 9.

SUMMERS, APPELLANT; THE HOLBORN DISTRICT BOARD OF WORKS, RESPONDENTS.

Metropolis—Obstruction of Streets—Costermongers—Statute—Construction—Repeal by Implication—57 Geo. 3, c. xxix., s. 65—The Metropolitan Streets Act, 1867 (30 *& 31 Vict. c.* 134), *s.* 6—*The Metropolitan Streets Act Amendment Act*, 1867 (31 *& 32 Vict. c.* 5), *s.* 1.

Sect. 65 of 57 Geo. 3. c. xxix., which empowered vestries in the metropolis to take certain summary proceedings against persons placing stalls and goods upon the carriage-ways or footways in streets or public places, is impliedly repealed, with respect to costermongers, by the operation of the Metropolitan Streets Act, 1867, s. 6, and the Metropolitan Streets Act Amendment Act, 1867, s. 1.

CASE stated by a metropolitan police magistrate, under the Summary Jurisdiction Acts.

The appellant, a costermonger, was summoned to appear before the magistrate upon a complaint made by one of the street inspectors to the respondents, the Holborn District Board of Works, for that the appellant on September 16, 1892, at Farringdon Road, in the liberty of Saffron Hill, within the metropolitan district, did place or cause to be placed upon the carriage-way of the said road a stall, wares, and merchandise, and did not immediately remove the same on being thereunto required by the inspector, contrary to the statute 57 Geo. 3, c. xxix., s. 65. It was admitted, or proved in evidence before the magistrate, that the Holborn District Board of Works was a body duly constituted under the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), and had the control of the pavements, both footways and carriage-ways of Farringdon Road within their district; that on August 8, 1892, a resolution was passed by the board, "that notice be given to the stall-keepers of the stalls situate within the district, to remove their stalls within one calendar

month, and, failing compliance with such notice, the board's inspectors be instructed to enforce their removal, and that the police be asked for their support"; that on September 16, the appellant was standing by his stall, which was placed in the carriage-way of Farringdon Road within the district, close to the kerb of the pavement; that articles of food were exposed for sale on the stall, and that the appellant was requested to remove the stall by the board's inspector, but refused to do so. There was no evidence before the magistrate of any breach by the appellant of any of the regulations made by the Commissioners of Police under the Metropolitan Police Acts, nor did the respondents contend that any such breach had been committed.

The magistrate convicted the appellant, and imposed a penalty upon him.

The question for the opinion of the Court was, whether the proceedings under 57 Geo. 3, c. xxix., s. 65 were rightly taken before the magistrate, and the conviction right in point of law having regard to the statutes 30 & 31 Vict. c. 134, and 31 & 32 Vict. c. 5. (1)

(1) By 57 Geo. 3, c. xxix., s. 65 (Michael Angelo Taylor's Act), it is provided, with respect to certain specified parts of the metropolis (in which Farringdon Road is included), that persons placing stalls, handbarrows, trucks, goods, &c., in or upon any part of the carriage or footways in any streets or public places, may be summoned before a justice of the peace, and, upon conviction, may be fined 40s. for the first offence, and for the second or any subsequent offence, any sum not exceeding 5*l.*, and power is given to the vestry to seize such stalls, goods, &c., and to sell the goods in the manner specified in the Act, without any warrant or other authority than the Act.

By the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 6, "No goods or other articles shall be allowed to rest on any footway or other part of a street within the general limits of this Act, or be otherwise allowed to cause obstruction or inconvenience to the passage of the public, for a longer time than may be absolutely necessary for loading or unloading such goods or other articles"; and a penalty not exceeding 40s. is imposed upon any person acting in contravention of that section. By s. 27: "All powers conferred by this Act, shall be in addition to and not in derogation of any other powers conferred by any other Act of Parliament, and any such other powers may be exercised as if this Act had not passed."

By the Metropolitan Streets Act Amendment Act, 1867 (31 & 32 Vict. c. 5), s. 1: "The 6th section of the Metropolitan Streets Act, 1867, prohibiting the deposit of goods in the streets, shall not apply to costermongers, street hawkers, or itinerant traders, so long as they carry on their business in accordance with the regulations from

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Frederick Low, for the appellant. The learned magistrate's decision was wrong. Sect. 65 of Michael Angelo Taylor's Act has been impliedly repealed by virtue of the Metropolitan Streets Act, 1867, s. 6, and the Metropolitan Streets Act Amendment Act, 1867, s. 1. The metropolitan police were not in existence when Michael Angelo Taylor's Act was passed, and the legislature, in passing the two Acts of 1867, intended to hand over to the police the duties of local bodies with respect to the regulation of the streets. It is admitted that the appellant has not infringed the police regulations. He is therefore protected from interference by s. 1 of the Metropolitan Streets Act Amendment Act, 1867. It would be a strange result if he were held to be still liable to the stringent penalties imposed by s. 65 of Michael Angelo Taylor's Act.

[He referred to *Fortescue* v. *Vestry of St. Matthew, Bethnal Green.* (1)]

C. J. Peile, (*Courthope Munroe* with him), for the respondents. The two subsequent Acts are not inconsistent with s. 65 of Michael Angelo Taylor's Act. The police regulations made under the Metropolitan Streets Act, 1867, and the amending Act of the same year are only with respect to traffic. The Holborn District Board of Works have to consider the wishes of the ratepayers of the district. Sect. 27 of the Metropolitan Streets Act, 1867, has the effect of saving the old procedure under Michael Angelo Taylor's Act, and the only effect of s. 1 of the Metropolitan Streets Act Amendment Act, 1867, is to exempt costermongers from the operation of s. 6 of the Metropolitan Streets Act, 1867. It leaves them open to the procedure under Michael Angelo Taylor's Act. The Metropolitan Streets Act confers limits of jurisdiction different from those conferred by Michael Angelo Taylor's Act. It applies to a different area, and there are distinctions in respect of offences and prosecutions. In giving powers to the police for the regulation of the streets, it was not intended to interfere with the jurisdiction of the

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time to time made by the Commissioners of Police, with the approval of the Secretary of State; and so much of the said 6th section as refers to the surface of any space that intervenes in any street between the footway and the carriageway, is hereby repealed."

(1) [1891] 2 Q. B. 170.

vestries under Michael Angelo Taylor's Act. A similar power to that given by s. 65 of Michael Angelo Taylor's Act is given to the metropolitan police by 2 & 3 Vict. c. 47, s. 60, sub-s. 7 (which is entitled "An Act for further improving the police in and near the metropolis"); and by s. 74, "nothing herein contained shall be construed to prevent .... any person from being liable under any other Act or Acts to any other or higher penalty or punishment than is provided for such offence by this Act, so nevertheless that no person be punished twice for the same offence." By s. 28 of the Metropolitan Streets Act, 1867, "this Act, so far as is consistent with the tenor thereof, shall be construed as one with the Acts relating to the Metropolitan Police." It is submitted that those enactments save the procedure under Michael Angelo Taylor's Act, and that there is no implied repeal of s. 65 of that Act.

LORD COLERIDGE, C.J. I am of opinion that the decision of the magistrate was wrong, and that the question which he asks in the case must be answered in the negative. The question he means to ask is substantially whether certain provisions of the statutes 30 & 31 Vict. c. 134 and 31 & 32 Vict. c. 5, are or are not practically inconsistent with s. 65 of the prior statute—Michael Angelo Taylor's Act. I think that they are; and that being so, according to well-established principles of law, the subsequent enactments must prevail. Under Michael Angelo Taylor's Act very stringent provisions were enacted against costermongers within an area nearly conterminous with the district subject to the Metropolitan Police Acts. The vestry were empowered to take very strong proceedings against costermongers. Under s. 65 the vestry could seize and sell goods placed on the footway. Indeed, that section goes further, and enables those proceedings to be taken not only against the costermongers, but against the owners of the goods and others. In the present case we are not concerned with any proceedings taken against those other persons. We are only concerned to decide whether costermongers are liable under the old Act of Parliament. As I have said, it is a very strong enactment. It enables the vestry to sweep away from a given place coster-

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Lord Coleridge, C.J.

mongers who may have carried on their business there with perfect honesty for many years. If s. 65 of that Act was still in force we should, of course, have nothing to do with any hardship which might result from its application; we should have simply to give effect to it; and if the result was to bring about hardship or oppression, the proper remedy must be sought in Parliament, and not in a court of law. But many years after Michael Angelo Taylor's Act was passed came the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134). By s. 6 regulations were enacted for the restraint, and practically for the abolition of the costermongers. Now I am not bound to consider it, but there may be a question whether Michael Angelo Taylor's Act and that Act could, or could not, be read as co-existent. But the Metropolitan Streets Act, 1867, was, so far as the costermongers are concerned, directly and in terms repealed by the Metropolitan Streets Act Amendment Act, 1867 (31 & 32 Vict. c. 5). Sect. 1 of that statute provides that "the 6th section of the Metropolitan Streets Act, 1867, prohibiting the deposit of goods in the streets, shall not apply to costermongers, street hawkers, or itinerant traders, so long as they carry on their business in accordance with the regulations from time to time made by the Commissioner of Police, with the approval of the Secretary of State." It seems to me plain that that provision, if it stood alone, is entirely inconsistent with and by implication repeals s. 65 of Michael Angelo Taylor's Act. It deals with the same subject-matter. It creates a different kind of procedure. It is in all respects, though applying to the same subject-matter, very different from the provisions contained in Michael Angelo Taylor's Act. Upon the clearest principles, therefore, if s. 1 of the Metropolitan Streets Act Amendment Act, 1867, stood alone, it must be held to repeal s. 65 of Michael Angelo Taylor's Act. If that were not so, no enactment could be more unfair or more entrapping for the costermongers. The later Act says, in effect, "If you carry on your business as you are directed by the Commissioner of Police, nobody shall interfere with you." It is not suggested that the appellant has carried on his business otherwise than in accordance with the regulations of the Commissioner of Police approved by the Secretary of State; yet it is said that the vestry may interfere

to stop his business and confiscate his goods. It is nothing to say that the vestry have not done so, for they may do it under the plain terms of Michael Angelo Taylor's Act. But it is said that s. 27 of the Metropolitan Streets Act, 1867, has the effect of keeping alive s. 65 of Michael Angelo Taylor's Act, because it provides that "all powers conferred by this Act shall be deemed to be in addition to and not in derogation of any other powers conferred by any other Act of Parliament, and any such powers may be exercised as if this Act had not passed." Two answers may, I think, be made to that contention. The first is that, reasonably construed, it must mean "powers conferred upon the same persons as have powers conferred upon them by this Act." There are no words to shew that the legislature intended to include powers conferred upon different persons. But, if that be not so, then still I cannot believe that it was intended by the general provisions of s. 27 to keep alive the highly penal legislation in s. 65 of Michael Angelo Taylor's Act, qualified as that section has been by the distinct and specific enactment, in s. 1 of the Metropolitan Streets Act Amendment Act, 1867, that the costermongers may carry on their business if they do so in accordance with the regulations from time to time made by the Commissioner of Police with the approval of the Secretary of State.

As to the argument founded upon 2 & 3 Vict. c. 47, s. 74, that is an Act which deals only with the police in the metropolis from the beginning to the end, and my answer to that argument must be very much the same as with respect to s. 27. Sect. 74 must, it seems to me, in reason and fairness be confined to the offences and to the proceedings and prosecutions which have been created or legalised by the statutes in pari materiâ having reference to the police. If I am wrong, then the general argument applies that s. 1 of the Metropolitan Streets Act Amendment Act, 1867, is the governing enactment, with respect to costermongers, of all those statutes; that, if its provisions are complied with, the costermongers are safe from interference, and that any other provisions inconsistent with that clear and distinct enactment must be taken to be impliedly repealed. There is no doubt that a repeal by implication is just as effective as by express words,

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though of course difficulties arise in determining whether there is a repeal by implication in the particular case before the Court. I am of opinion that the magistrate's decision was wrong, and that this conviction cannot stand.

CAVE, J. I am of the same opinion. The general rule is that when you have an Act of Parliament enacting particular provisions, and in a subsequent Act there are provisions which are inconsistent with the provisions of the first Act, both enactments cannot stand together. The enactment in the second Act stands and repeals the enactment in the first Act. Of course, from the necessity of the case, it is an implied and not an express repeal. We have to see here whether the provisions made by subsequent legislation are inconsistent with the provisions in s. 65 of Michael Angelo Taylor's Act, so that the latter provisions have been impliedly repealed. Now, all the subsequent legislation has been with respect to metropolitan police provision; and, so far as I am aware, Michael Angelo Taylor's Act does not seem to have been referred to in that legislation. It is remarkable that Michael Angelo Taylor's Act has not been referred to, as the previous statutes relating to the police and streets of London are from time to time, by a provision that it was to be construed together with the subsequent statutes. The appellant here has undoubtedly committed an offence against s. 65 of Michael Angelo Taylor's Act, and proceedings have been taken against him under that Act. He has also committed an offence against s. 6 of the Metropolitan Streets Act, 1867. Those two Acts, so far as they apply to the same offences, provide for different procedure and for different punishments, and if there was nothing more, they could not, in accordance with the general rule, stand together. The authority for that is to be found in *Fortescue* v. *Vestry of St. Matthew, Bethnal Green.* (1) But in determining whether the two Acts can stand together you must look at the whole of the provisions, and, looking at the whole of them, must say whether it was, or was not, intended that the former legislation should stand. Now, we have been referred to s. 74 of 2 & 3 Vict. c. 47. [The

(1) [1891] 2 Q. B. 170.

learned Judge read the section.] That is a provision contained in an Act prior to the Metropolitan Streets Act, 1867, and it is to be read together with that Act. If the matter rested there, I should be of opinion that s. 74 of 2 & 3 Vict. c. 47 did shew the intention of the legislature that Michael Angelo Taylor's Act in this respect should not be repealed, but should stand side by side with the Act of 1867. I am not pressed by s. 27 of the Metropolitan Streets Act, 1867, because I am clearly of opinion that the word "powers" in that section does not apply to the duty of the persons who are entrusted with the management of the streets to proceed for the infliction of penalties. In my judgment that is not a "power" within the meaning of the section. There are plenty of instances of powers given with respect to the regulation of the street traffic and other matters, and I am clearly of opinion that those were the powers intended to be referred to, and not the right to proceed against a man for a penalty. If corroboration be wanted for that view, it is to be found in s. 74 of 2 & 3 Vict. c. 47, which is incorporated with the Metropolitan Streets Act, 1867, and expressly provides that proceedings under any other Act may be taken against an offender. It would therefore be unnecessary to construe "powers" in s. 27 of the Act of 1867 to mean the right to proceed against a man for a penalty. It would be construing the word out of its proper meaning, because s. 74 of 2 & 3 Vict. c. 47 produces exactly the same effect. If, therefore, the legislation had stopped there I should have said that the magistrate's decision was clearly right, because s. 74 of 2 & 3 Vict. c. 47 would have shewn the intention of the legislature that the provisions, in this respect, of Michael Angelo Taylor's Act and the Metropolitan Streets Act, 1867, should stand together. But then comes the Metropolitan Streets Act Amendment Act, 1867, s. 1, which is as follows: [The learned Judge read s. 1.] Now, if the legislature had said in terms that the costermongers, if they complied with the regulations of the Commissioner of Police, should not be liable to the comparatively mild penalty imposed by the Metropolitan Streets Act, 1867, but should be liable to the severer penalties imposed by Michael Angelo Taylor's Act, one would have been obliged, however reluctantly, to have come

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Cave, J.

to the conclusion that that was what the legislature meant. But it is monstrous to suppose they meant that the costermongers, if they complied with the regulations of the Commissioner of Police, might do the very things that are prohibited by an Act of Parliament imposing a less penalty, but that they were not in any way protected against proceedings under another Act of Parliament which imposes severer penalties. The provisions of the Metropolitan Streets Act Amendment Act, 1867, are wholly inconsistent with the provisions in s. 65 of Michael Angelo Taylor's Act. It is wholly inconsistent to say, "You may do particular things so long as you comply with the regulations of the Commissioner of Police," and to say with the same breath, "But if you do them, and comply with the orders of the Commissioner, you shall be liable to a penalty of 40*s.* for the first offence, and 5*l.* for any subsequent offence." I cannot for a moment conceive that the legislature could have intended a result so monstrous. It would be in effect giving the costermongers nothing. It would be misleading them. It would tempt them to invest their money for the purpose, perhaps, of buying barrows and goods in order to carry on their business in accordance with the regulations of the Commissioner of Police, and at the same moment expose them to have those barrows and goods swept off by the vestry. In view of that result I do not hesitate to say that the legislation of s. 1 of the Metropolitan Streets Act Amendment Act, 1867, is quite inconsistent with the supposed retention by the legislature of the provisions of s. 65 of Michael Angelo Taylor's Act, and that it is impossible they can both stand together.

I therefore come to the conclusion that the magistrate's decision was wrong, and that this appeal should be allowed.

Judgment for the appellant.

Solicitor for appellant: *A. Newton.*
Solicitor for respondents: *Matthew H. Hale.*

W. A.

THE QUEEN *v.* HOPKINS.

1893
Jan. 31;
Feb. 17.

Metropolis—Police Acts—Jurisdiction of Magistrate—Street Musician—Non-payment of Penalty—Imprisonment in Default—2 & 3 Vict. c. 47, s. 77—27 & 28 Vict. c. 55, s. 1.

By 2 & 3 Vict. c. 47 (The Metropolitan Police Act, 1839), s. 57, any householder might require a street musician to depart from the neighbourhood of his house for reasonable cause, and every person who played on a musical instrument in a thoroughfare near any house, after being so required to depart, was made liable to a penalty of not more than forty shillings. By s. 77, in case of the non-payment of a pecuniary penalty imposed under the Act, the magistrate might commit the offender to prison for not more than one month where the fine did not exceed five pounds; the imprisonment to cease on payment of the sum due.

By 27 & 28 Vict. c. 55, s. 1 (The Street Music Act, 1864), s. 57 of 2 & 3 Vict. c. 47, was repealed, "and in lieu thereof the following provision shall take effect as part of the said Act." The offence was then described in similar language, and the offender made liable to a penalty of not more than forty shillings, or, in the discretion of the magistrate, to imprisonment for any time not exceeding three days.

A street musician was convicted under 27 & 28 Vict. c. 55, s. 1, and was sentenced to pay a fine of forty shillings, and in default of payment to be imprisoned for a month:—

Held, that 27 & 28 Vict. c. 55 did not operate to impliedly repeal s. 77 of the earlier Act; that the penalty was, therefore, capable of being enforced by imprisonment as provided by that section, and the conviction was good.

ORDER NISI for a writ of certiorari to bring up and quash a conviction of one George Reynolds by a metropolitan police magistrate, under 27 & 28 Vict. c. 55, s. 1, for playing a musical instrument in a thoroughfare to the annoyance of the inhabitants, after being required by a householder to depart. By the conviction the applicant was ordered to pay forthwith a penalty of 40*s.* and costs, and in default of payment to be imprisoned for the space of one calendar month, unless the said sums should be sooner paid. From an affidavit made by the learned magistrate it appeared that on the day of the conviction it was reported to him shortly before the Court rose that the applicant had not paid his fine; that the applicant and one Sprenger, who had been convicted on another summons of singing in a thoroughfare under like circumstances, were then brought

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into court and informed that they were in peril of commitment to prison in default of payment, and were asked if they would pay or desired time for payment, the learned magistrate saying that he was very willing to give them time. The applicant answered, "I shall not pay. I do not ask for time; it is for conscience' sake; I would rather go to prison now;" and Sprenger said, "I want it to go on as it is." The warrants of commitment were then signed by the learned magistrate. An order nisi for the writ of certiorari to quash the conviction was obtained in each case, on the ground that there was no jurisdiction to inflict the penalty of one month's imprisonment in default of payment of the fine of 40*s*. (1)

(1) By 2 & 3 Vict. c. 47 (The Metropolitan Police Act, 1839), s. 57, any householder may require a street musician to depart from the neighbourhood of his house for reasonable cause, and every person who plays upon any musical instrument in any thoroughfare near any house, after being so required to depart, is made liable to a penalty of not more than forty shillings.

By s. 77: "In every case of the adjudication of a pecuniary penalty or amends under this Act, and non-payment thereof, it shall be lawful for the magistrate to commit the offender to any gaol or house of correction within his jurisdiction for a term not more than one calendar month, where the sum to be paid shall not exceed five pounds, the imprisonment to cease on payment of the sum due."

By 27 & 28 Vict. c. 55, s. 1: "Sect. 57 of [2 & 3 Vict. c. 47] is hereby repealed, and in lieu thereof the following provision shall take effect as part of the said Act—namely, any householder within the metropolitan police district . . . . may require any street musician or street singer to depart," &c.; "and every person who shall sound or play upon any musical instrument, or shall sing in any thoroughfare or public place near any such house, after being so required to depart, shall be liable to a penalty not more than forty shillings, or, in the discretion of the magistrate before whom he shall be convicted, may be imprisoned for any time not more than three days."

By 42 & 43 Vict. c. 49 (The Summary Jurisdiction Act, 1879), s. 5: "The period of imprisonment imposed by a court of summary jurisdiction under this Act, or under any other Act, whether past or future, in respect of the non-payment of any sum of money adjudged to be paid by a conviction, or in respect of the default of a sufficient distress to satisfy any such sum, shall, notwithstanding any enactment to the contrary in any past Act, be such period as in the opinion of the Court will satisfy the justice of the case, but shall not exceed in any case the maximum fixed by the following scale: that is to say, where the amount of the sum or sums of money adjudged to be paid by a conviction, as ascertained by the conviction . . . . exceeds one pound, but does not exceed five pounds—one month."

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Jan. 31. *Bankes*, (*H. Sutton*, with him), for the magistrate, shewed cause against the rule. The order of the learned magistrate was right. The preamble of 27 & 28 Vict. c. 55, recites s. 57 of the Police Act, and says that it has been found insufficient for the protection of householders from annoyance by street musicians; the intention of the Act was therefore to extend the power of magistrates in dealing with such cases, and to enable them to inflict a severer punishment on offenders. The Act enables a sentence of imprisonment to be passed for the offence without giving the offender the option of paying a fine; it deals with the punishment of the original offence, not with the mode of recovering or enforcing the penalty. The mode of enforcing the penalty is dealt with by s. 77 of the Police Act, and as the provisions of s. 1 of the Act of 1864 are to be read into that Act, s. 77 is applicable to the enforcement of the penalty, unless it has been repealed. It has nowhere been expressly repealed, nor has there been any implied repeal; the Act of 1864, in authorizing a term of three days' imprisonment, gives the magistrate a discretion as to the way in which he will deal with the offence, but does not impliedly repeal the power given by s. 77 of the earlier Act, to imprison for a month in default of payment of a fine. There is nothing really inconsistent in non-payment of the fine involving imprisonment for a month while the period of imprisonment for the offence itself is limited to three days; the imprisonment is of a different character in the two cases; imprisonment in default of payment of a fine can be put an end to at any time by payment; while imprisonment as a substantive punishment for the offence cannot be abridged by any act of the person imprisoned.

[BRUCE, J. Is there any case in which a magistrate has the power to impose a longer sentence of imprisonment for non-payment of a fine than he could impose in the first instance as a punishment for the offence?]

Under s. 194 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), a borough constable who is guilty of neglect of duty may be imprisoned for any time not exceeding ten days, or, in the discretion of the Court, may be fined not more than 40*s.*, the penalty would be enforced under the Summary Jurisdiction Act, 1879, which authorizes imprisonment for a month in default

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of payment of a fine exceeding 1*l.* and not exceeding 5*l.* And the point was incidentally dealt with in *In re Brown* (1), in which case Cockburn, C.J., and Mellor, J., differed in opinion upon it.

Even if s. 77 had been impliedly repealed, proceedings to enforce the penalty would have to be taken under 11 & 12 Vict. c. 43, s. 19 (Jervis's Act), and 42 & 43 Vict. c. 49; under the former Act upon default of distress there would be power to imprison, and under the latter the period of imprisonment would be a month. The circumstances shew that an objection on the ground of a distress warrant not having been issued would be purely technical, and that the applicant could have suffered no substantial grievance.

[He also cited *Reg.* v. *Justices of Teignmouth.* (2)]

Witt, Q.C. (*Bodilly*, with him), for the applicant. The magistrate had no jurisdiction to commit the applicant for a month in default of payment of the fine; otherwise, the effect of the Act of 1864 is to give the magistrate three alternatives as to the punishment to be awarded instead of the two specified in the Act; not only could he impose a fine of 40*s.*, or a sentence of three days' imprisonment, but he could impose a sentence of a month's imprisonment in default of payment of the fine. The Act of 1864 contains the code as to playing and singing in the public streets; it defines the offence and fixes the penalty, and it cannot be so construed by bringing in prior legislation as to give a third alternative mode of punishment which is not contained in the Act itself. The true effect of that Act is to impliedly repeal s. 77 of the Police Act; and there being then no express provision for the enforcement of the penalty, it would be recovered under the provisions of Jervis's Act—that is to say, by the issuing of a distress warrant under s. 19; in default of distress there would be a power, under s. 21, to imprison for the time mentioned in the statute on which the conviction was founded—three days. It is inconsistent that, while the substantive penalty for the offence itself is three days' imprisonment, non-payment of the fine should involve imprisonment for a month.

Cur. adv. vult.

(1) 3 Q. B. D. 545.

(2) 16 Q. B. D. 647.

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1893. Feb. 17. The following written judgment was read by

BRUCE, J. In this case the defendant has been fined 40*s.*, and in default has been committed to prison for one month. The question before us is, whether the order of the magistrate is good on the face of it. The answer to that question depends upon whether the magistrate has power to commit the defendant to prison for a month in default of payment of the fine of 40*s.*

The 2 & 3 Vict. c. 47, s. 57, contained an enactment to protect householders within the metropolitan police district suffering annoyance from street musicians, and provided that any person offending against the provisions of the section should be liable to a penalty of not more than 40*s.* By s. 77 of the same Act it was provided that "in every case of the adjudication of a pecuniary penalty under this Act and non-payment thereof, it shall be lawful for the magistrate to commit the offender to gaol . . . . for a term of not more than one calendar month where the sum to be paid shall not exceed five pounds, the imprisonment to cease on payment of the sum due." It must be admitted that, under the provisions of *this* Act, a person who was adjudged liable to pay the penalty of 40*s.* might, in default, have been committed to prison for a term not more than one month. But in 1864, s. 57 of the last-mentioned Act was repealed by 27 & 28 Vict. c. 55, which enacts as follows: "Sect. 57 of 2 & 3 Vict. c. 47, is hereby repealed, and in lieu thereof the following provision shall take effect"; then follow words describing the offence, and the section enacts that a person convicted of an offence against its provisions, shall be liable to a penalty of not more than 40*s.*, or, in the discretion of the magistrate before whom he shall be convicted, may be imprisoned for any time not more than three days.

It has been contended before us with great force that it is an unreasonable thing that the non-payment of a fine should be treated as an offence punishable by imprisonment for so long a period as a month, when the offence for which the fine was imposed could not be punished by imprisonment for a longer period than three days, and I think that we should be astute to endeavour to find if possible some reasonable meaning of the words of the legislature which will enable us to escape from such

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a construction. But if the legislature has clearly expressed its intention we have no alternative but to give effect to its enactments.

By 27 & 28 Vict. c. 55, it is expressly enacted that the words of the new enactment are to be read into 2 & 3 Vict. c. 47, "in lieu" of the repealed section. According to the ordinary canons of construction, the new clause imposing the penalty of 40s. should be read as part of the Act 2 & 3 Vict. c. 47, and in that case the penalty would of course be capable of being enforced by imprisonment as provided by s. 77 of the last-mentioned Act. But it is said that it would be so unreasonable to adopt this construction that we ought to treat s. 77 as inapplicable to the altered state of things; in other words, we must arrive at the conclusion that the legislature never could have intended that a man should be liable to be sent to prison for non-payment of a penalty for a longer term than that for which he was liable to have been sent to prison by way of punishment for the offence for which the penalty was imposed.

But it seems to me that the legislature has expressed, and in words which admit of no doubt, exactly the opposite intention. For reasons best known to those who framed the statute 2 & 3 Vict. c. 47, the legislature has considered it right in cases other than that now under consideration that the payment of a penalty should be enforced by a longer term of imprisonment than could have been awarded in respect of the offence for which the penalty is imposed. Sect. 58 of 2 & 3 Vict. c. 47, seems to me to place this beyond doubt. A person who is found drunk and disorderly in the public streets is rendered by that section liable to a penalty of not more than 40s., or he may be committed, if the magistrate shall think fit, instead of inflicting on him any pecuniary penalty, to the house of correction for any time not more than seven days. It seems to me to be clear that the penalty imposed by s. 58 may be enforced by imprisonment for a month under s. 77, although the imprisonment awarded in respect of the offence in respect of which the penalty is imposed could not exceed seven days. That being so, I do not think we ought to set aside the ordinary rules of construction upon the assumption that the legislature never could have intended to

adopt a principle which it has, as it seems to me, expressly adopted in the very Act which is now under consideration. If s. 77 applies to the enforcement of the pecuniary penalty imposed by s. 58 of 2 & 3 Vict. c. 47, why should it not apply to the pecuniary penalty imposed by 27 & 28 Vict. c. 55, s. 1, which is to be read as part of 2 & 3 Vict. c. 47, and in lieu of s. 57?

But it seems to me that there is very little substance in the objection that is made. Even if s. 77 of 2 & 3 Vict. c. 47, is to be regarded as inapplicable, then, as there is no express provision for the enforcement of the penalty, it can be enforced only under s. 19 of 11 & 12 Vict. c. 43. But even in that case imprisonment for a term not exceeding one month is the ultimate remedy for enforcing the penalty. It is quite true that under the section last-mentioned imprisonment can only be resorted to where there is no sufficient distress; but the anomaly remains that a defendant who has neither money nor goods may be sent to prison for one month for the non-payment of a fine of 40*s*. So that the objection to the conviction is of a technical character; it is an objection to the form of the conviction only. Had the commitment been in the form of a commitment for want of distress, it would have been undoubtedly legal. It may be said that there are cases in which it may be of great importance to a defendant to have a distress levied rather than be sent to prison; but no hardship in that respect arises in the present case. By the Summary Jurisdiction Act, 1879, the magistrate is invested with very extensive powers as to giving time for payment of a penalty, and it is perfectly clear in the present case from the facts disclosed in the magistrate's affidavit that he was willing to give the defendants any reasonable indulgence in that direction, but that they refused it; one of the defendants said, "I shall not pay; I do not ask for time; it is for conscience' sake; I would rather go to prison now;" while the other said, "I want it to go on as it is." This entirely disposes of any hardship upon the prisoners on that head. Of course, if Jervis's Act made it necessary for the magistrate to issue a distress warrant before exercising his power of committing to prison, the defendants would be entitled to have these convictions

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set aside; but for the reasons I have already given I think that s. 77 of 2 & 3 Vict. c. 47, applies to the present case, and the provisions of Jervis's Act are therefore inapplicable.

LORD COLERIDGE, C.J. In this case I yield with great reluctance to the judgment of my learned brother; but I yield to it completely. At the end of the argument I had formed a strong opinion the other way, and was prepared to give judgment in favour of the defendants upon the ground of the difficulty and the great anomaly of holding that a man can be sent to prison for a longer time if he is merely fined for an offence than he could be if he in the first instance received a sentence of imprisonment for the offence itself. I am still not free from the feeling that this is an anomaly; but I am quite unable to answer the analogy of the case of the man who is found drunk and disorderly in the public streets which my brother has discovered; the analogy is complete; the mere difference in the two Acts between three days and seven days' imprisonment is not worth consideration. It is plain that the legislature has only imposed a term of seven days' imprisonment for that offence, and that a person convicted of it may nevertheless be sent to prison for one month for non-payment of the fine inflicted, if the magistrate adopts the course of fining him instead of imprisoning him for the offence. The analogy of that case, as I have said, I cannot answer. Parliament can cut the Gordian knot by repealing or amending its own statutes; but we have to endeavour to logically interpret an Act of Parliament in accordance with its true meaning; and any objection arising on the ground of hardship or anomaly must be dealt with by Parliament itself, and not by a judicial decision which strains the language of the statute. I yield, therefore, to the judgment of my learned brother, and I desire to say emphatically that I not only do not dissent from it, but that I wholly assent to it, although for the reasons I have given I assent reluctantly.

Rule discharged.

Solicitors for applicant: *Ranger & Burton.*
Solicitor for magistrate: *Solicitor to the Treasury.*

W. J. B.

[IN THE COURT OF APPEAL.]

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March 2.

DONOVAN *v.* LAING, WHARTON, AND DOWN CONSTRUCTION SYNDICATE, LIMITED.

Master and Servant—Negligence—Servant lent to perform Particular Services—Master parting with Control over Servant—Control of Hirer—Non-liability of Master for Negligence of Servant.

The defendants contracted to lend to a firm who were engaged in loading a ship at their wharf a crane with a man in charge of it. The man in charge of the crane received directions from the firm or their servants as to the working of the crane, and the defendants had no control in the matter. The plaintiff, who was a servant of the wharfingers and was employed by them to direct the working of the crane, sustained an injury through being struck by it by reason of the negligence of the man in charge, and sued the defendants on the ground that the negligence was the act of their servant:—

Held, that, though the man in charge of the crane remained the general servant of the defendants, yet, as they had parted with the power of controlling him with regard to the matter on which he was engaged, they were not liable for his negligence while so employed.

APPEAL of the plaintiff from a judgment entered for the defendants at the trial before Pollock, B., with a jury.

The action was brought by the plaintiff to recover damages for personal injuries sustained by him through the negligence of a man named Wand, who was in the employment of the defendants.

The defendants were the owners of a crane capable of being used for the purpose of loading and unloading vessels, and they had made an agreement with a firm of wharfingers, called Jones & Co., to supply to them the crane and a man to work it whenever that firm might require it for loading or unloading ships at their wharf. The man sent in charge of the crane worked it in conformity with directions received from Messrs. Jones & Co. or their servants. Upon the occasion when the accident happened, the plaintiff, who was a workman in the employment of Jones & Co., was employed by them to give directions to Wand, who was in charge of the crane, and his duty was to stand at the edge of the wharf and give the signals for the crane to be set in motion for the purpose of lowering the chain, raising the goods when attached to the chain from the wharf, and lowering them

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into the hold. While the loading was going on, Wand on one occasion did not wait for the signal from the plaintiff, but caused the crane to swing round towards the wharf, and, in so swinging round, it struck and injured the plaintiff. At the trial the jury found that the injury to the plaintiff was due to negligence on the part of Wand, and assessed the damages; but the learned judge entered judgment for the defendants upon the ground that Wand was, for the purpose of these operations, the servant of Jones & Co., and not of the defendants.

The plaintiff appealed.

Cock, Q.C., and *Lynden Bell*, for the plaintiff. The question is whether this case falls within the doctrine of *Laugher* v. *Pointer* (1) and *Quarman* v. *Burnett* (2), or within that of *Rourke* v. *White Moss Colliery Co.* (3) The test is whether the defendant's servant, whose negligence caused the injury to the plaintiff, was carrying out work which the defendants had themselves contracted to perform, or whether he had been so handed over by the defendants to another person that such other person had the whole control over him, and for the occasion became his master. It is submitted that the proper conclusion in this case is that the defendants had contracted with Jones & Co. to do certain work with their crane and man in connection with the loading of the ship, and that Wand was acting as the defendants' servant in doing such work. It is clear that Wand was in general the servant and under the control of the defendants, who engaged and paid him; and the onus lies on them of shewing that he was so handed over on this occasion as to be entirely under the control and at the disposal of Jones & Co. It is not enough that he might to some extent be subject to the orders of Jones & Co., for, in order to make the general servant of one the servant of another, the control of the former must cease and be transferred to the latter, as pointed out by Lord Watson in *Johnson* v. *Lindsay & Co.* (4) What occurred in this case was that Wand was directed by his master, the defendants, to do the work in conformity with the order of Jones & Co., who would no doubt

(1) 5 B. & C. 547.
(2) 6 M. & W. 499.
(3) 2 C. P. D. 205.
(4) [1891] A. C. 371, at p. 382.

have to give him directions as to what was wanted to be done, and when he was to begin to work the crane and when to stop it; but this was not enough to make him their servant. The drivers in *Laugher* v. *Pointer* (1) and *Quarman* v. *Burnett* (2) must have been to that extent subject to the orders of the hirer, and yet they were not held to be the hirer's servants. The case of *Rourke* v. *White Moss Colliery Co.* (3) is distinguishable on the ground that there was clear evidence in that case that the man whose negligence caused the mischief was placed by the defendants entirely at the disposal of a third person.

[They also cited *Jones* v. *Mayor of Liverpool.* (4)]

Lawson Walton, Q.C., and *J. F. P. Rawlinson*, for the defendants, were not called on.

LORD ESHER, M.R. In this case the plaintiff brings an action against the defendants to recover damages for injuries sustained through the negligent act of a man who is said to have been, at the time of committing the negligent act, a servant of the defendants, for whose negligence the defendants are liable. The facts are undisputed. A firm, Messrs. Jones & Co., were engaged in loading a ship from a quay. They had no crane which they could use for that purpose; but the defendants had one, which they were in the habit of lending out with a man in charge of it. On this occasion they lent the crane, with the man in charge, to Jones & Co., for the purpose of assisting in loading the ship. The ordinary mode of using a crane for loading a ship is well known. The goods to be loaded are fastened to the chain and raised, and then the arm of the crane is swung round, so as to bring the goods over the part of the ship where they are to be placed, which is determined by the people who have the control of the loading. How far the crane is to be swung, and how much the chain is to be lowered, depends on what part of the ship the goods are to be placed in, and every act in connection with the working of the crane must be done according to the orders of those who are directing the loading.

(1) 5 B. & C. 547.
(2) 6 M. & W. 499.
(3) 2 C. P. D. 205.
(4) 14 Q. B. D. 890.

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Lord Esher, M.R.

In this case the crane and the man to work it were lent by the defendants to Jones & Co. for a consideration, and to be used in the manner I have described. For some purposes, no doubt, the man was the servant of the defendants. Probably, if he had let the crane get out of order by his neglect, and in consequence any one was injured thereby, the defendants might be liable; but the accident in this case did not happen from that cause, but from the manner of working the crane. The man was bound to work the crane according to the orders and under the entire and absolute control of Jones & Co.

That being so, whose servant was the man in charge of the crane as to the working of it? It is true that the defendants selected the man and paid his wages, and these are circumstances which, if nothing else intervened, would be strong to shew that he was the servant of the defendants. So, indeed, he was as to a great many things; but as to the working of the crane he was no longer their servant, but bound to work under the orders of Jones & Co., and, if they saw the man misconducting himself in working the crane or disobeying their orders, they would have a right to discharge him from that employment. This conclusion hardly requires authority; but there is authority for it, without going back to an earlier date, in the case of *Rourke* v. *White Moss Colliery Co.* (1)

There one of the questions was, whose servant a man called Lawrence was. He was the general servant of the defendants, but he was hired out to another person, and so far as concerned the operation which he performed for that person, and in which he was negligent, he was held not to be the servant of the defendants. Cockburn, C.J., in that case said: "It appears to me that the defendants put the engine and this man Lawrence at Whittle's disposal, just as much as if they had lent both to him. But when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." Nothing can be clearer than that. The man was the servant of the defendants; but he

(1) 2 C. P. D. 205.

was lent to Whittle, and was negligent in the operation in which Whittle employed him, and he was held, so far as that operation was concerned, to be in the employment of Whittle who had the control of the matter on which he was engaged, over which his general master had no control.

The passage referred to from the judgment of Lord Watson in *Johnson* v. *Lindsay & Co.* (1) seems to me to be exactly to the same effect. I only notice the case of *Jones* v. *Mayor of Liverpool* (2), because Grove, J., seems to have thought there was a difference between the cases of a master lending a general servant for a consideration and lending him gratuitously. It seems to me impossible to say that the consideration has anything to do with the principle on which the servant must be held to be in the employ of one or the other. In the present case, so far as the working of the crane went and so long as he was working it, the man in charge was the servant of Jones & Co., and was not the servant of the defendants. The appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. The key to the whole case is that Jones & Co. were loading the ship, and not the defendants. The crane was being used for Jones & Co.'s purposes, and not for those of the defendants, and the former must for that particular job be considered as Wand's masters. That brings the case within *Rourke* v. *White Moss Colliery Co.* (3), which was a decision of the Court of Appeal, and was in my opinion decided on right principles. I agree also with the decision in *Jones* v. *Mayor of Liverpool* (2), except as to the observations on which the Master of the Rolls has commented.

BOWEN, L.J. The law on the matter now before us seems to me to be perfectly clear. The question is not who procured the doing of the unlawful act; but depends on the doctrine of the liability of a master for the acts of his servant done in the course of his employment. We have only to consider in whose

(1) [1891] A. C. 371, at p. 382. (2) 14 Q. B. D. 890.
(3) 2 C. P. D. 205.

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employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act. That was the test laid down by Crompton, J., nearly forty years ago, in *Sadler* v. *Henlock* (1), in the form of the question, "Did the defendants retain the power of controlling the work?" Here the defendants certainly parted with some control over the man, and the question arises whether they parted with the power of controlling the operation on which the man was engaged. There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and, the end being prescribed, the means of arriving at it may be left to him. Or he may contract in a different manner, and, not doing the work himself, may place his servants and plant under the control of another—that is, he may lend them—and in that case he does not retain control over the work. It is clear here that the defendants placed their man at the disposal of Jones & Co., and did not have any control over the work he was to do. The case is on the same lines as *Rourke* v. *White Moss Colliery Co.* (2), and Lord Watson's decision in *Johnson* v. *Lindsay & Co.* (3) does not differ from the view taken of the law in the other case. The principal part of the argument for the plaintiff was founded on what may be called the carriage cases: *Laugher* v. *Pointer* (4), and *Quarman* v. *Burnett* (5); but they really have nothing to do with the point presented in this appeal. If a man lets out a carriage on hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. The coachman does not become the servant of the person he is driving; and if the coachman acts wrongly, the hirer can only complain to the owner of the carriage. If the hirer actively interferes with the driving, and injury occurs to any one, the hirer may be liable, not as a master, but as the procurer and cause of the wrongful act complained of.

In the present case the defendants parted for a time with

(1) 4 E. & B. 570.
(2) 2 C. P. D. 205.
(3) [1891] A. C. 371, at p. 382.
(4) 5 B. & C. 547.
(5) 6 M. & W. 499.

control over the work of the man in charge of the crane, and their responsibility for his acts ceased for a time.

I have only to add, that I agree that no difference can arise whether the lending of the servant to another person is in consideration of some reward or not. Such a distinction obviously cannot affect the reasoning on which I have based my judgment.

Appeal dismissed.

Solicitor for the plaintiff: *Roland H. Ward.*
Solicitor for the defendants: *Henry F. Kite.*

A. M.

[IN THE COURT OF APPEAL.]

MURRAY AND OTHERS, JUSTICES OF THE PEACE FOR THE CITY OF MANCHESTER *v.* FREER.

Licensing Acts—Licence—Lapse—Discretion of Justices to refuse Transfer—Licensing Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Wine and Beerhouse Act*, 1869 (32 *& 33 Vict. c.* 27), *ss.* 8, 19.

The tenant of a beerhouse, which had been continuously licensed for the sale of beer to be consumed on the premises, from a date prior to May 1, 1869, was convicted of permitting drunkenness on the premises, and in consequence of the conviction the justices, at the general annual licensing meeting in August, 1891, refused to renew the licence, which accordingly expired on October 10, 1891. On October 5, 1891, the tenant yielded up possession of the house to the respondent, who, on November 17, 1891, applied to the justices at special sessions for a transfer of the licence:—

Held, that, at the date of the application, the licence was not "in force" within the meaning of s. 19 of the Wine and Beerhouse Act, 1869, and that, consequently, the justices' power of refusing the transfer was not limited to the four grounds mentioned in s. 8 of that Act.

Decision of Queen's Bench Division (ante, p. 281) reversed.

APPEAL by justices against the affirmance by a Divisional Court (Pollock, B., and Vaughan Williams, J.) (1), of an order made by quarter sessions for the transfer of a beerhouse licence.

The case stated by quarter sessions was in substance as follows:—The Pheasant Inn, No. 155, Chester Street, Manchester, was continuously licensed for the sale of beer to be consumed on and off the premises, from a date prior to May 1,

(1) Ante, p. 281.

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1869, until October 10, 1891, when the certificate of justices granted in respect of the house, pursuant to 32 & 33 Vict. c. 27, ss. 5, 6, which had been in force from October 10, 1890, expired. The certificate and the excise licence were granted to John Faulkner, who was tenant of the house, and had been previously licensed in respect thereof. On November 21, 1888, Faulkner was convicted of permitting drunkenness in the house, and was fined 40*s.* and costs. Faulkner applied to the justices at the general annual licensing sessions for Manchester, in September, 1889, for a renewal of the licence. The renewal was then granted; but the justices warned Faulkner that, if he were again convicted, they would not again renew the licence. On December 30, 1890, Faulkner was again convicted of permitting drunkenness in the house, and was fined 40*s.* and costs. At the general annual licensing sessions, held on August 27, 1891, an objection being made by the superintendent of police for the district to the renewal of the licence to the house, on account of the convictions, the justices adjourned the consideration of the matter to September 10, 1891, and on that day Faulkner applied to them for a renewal of the licence, which was refused.

Faulkner did not appeal from the refusal to renew the licence, but upon October 5, 1891, he removed from and yielded up possession of the house to Isaac Freer, who forthwith took possession, and had ever since remained and still remained in possession thereof. On October 9, 1891, Freer gave notice, under s. 14 of 9 Geo. 4, c. 61, of his intention to apply to the special sessions for a transfer of the licence, and in pursuance of the notice he, on November 17, 1891, applied to the justices pursuant to s. 14, for a transfer of the licence of the house to him. It was contended on his behalf that the conviction of the previous licencee, Faulkner, was caused by his personal misconduct, and that the justices could only refuse the transfer to Freer upon one of the four grounds set forth in s. 8 of 32 & 33 Vict. c. 27. It was admitted by the justices that, if their discretion was limited to those four grounds, the respondent was entitled to the transfer. The justices, however, were of opinion that there was then no licence in force in respect of the house, inasmuch as it had expired on October 10, 1891, and had never

since been in existence; and that, the renewal thereof having been refused, and the refusal not appealed against, the licence had not been granted by way of renewal from time to time, so as to entitle Freer to the benefit of s. 19 of 32 & 33 Vict. c. 27, and s. 7 of 33 & 34 Vict. c. 29, and that, in dealing with the application, they were not limited to the four grounds of refusal, but were at liberty to exercise their discretion, and to take into their consideration the nature of the neighbourhood and its requirements, and the history of the house, not only when it was in the hands of Freer, but previously to his occupation thereof, and they accordingly refused the application on the grounds that the house was situated in a neighbourhood where thieves and prostitutes abounded, and it was difficult to preserve order; that the history of the house shewed that the three or four last successive tenants had none of them been able to conduct it without breaches of the licensing laws; and that there were in existence in immediate proximity to it a larger number of fully-licensed houses and beerhouses than were required. An appeal was lodged to the quarter sessions, where the justices sitting on January 12, 1892, granted the transfer of the licence to Freer, subject to a special case being stated for the opinion of the Court.

The Divisional Court affirmed the decision of the quarter sessions, holding that, at the date of the application on November 17, 1891, the licence was still "in force" within the meaning of s. 19 of 32 & 33 Vict. c. 27, and that the justices' power of refusing the transfer was limited to the four grounds mentioned in s. 8 of that Act.

The justices appealed.

Sir C. Russell, A.G., Joseph Walton, Q.C., and *Avory*, for the justices. The substantial question is, whether the justices are fettered in the exercise of their discretion; whether they could refuse to grant the application only upon one of the four grounds mentioned in s. 8 of the Wine and Beerhouse Act, 1869, or whether they have the same wide discretion as they have in cases which do not come within s. 19 of that Act. It is admitted that none of those four grounds existed in the present case. It

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might be argued that the respondent had no locus standi under s. 14 of 9 Geo. 4, c. 61 (1), to make the application, because the

(1) By s. 14 of 9 Geo. 4, c. 61: "If any person duly licensed under the Act, or the assigns of any person so licensed, shall remove from, or yield up the possession of the house specified in such licence; or, if the occupier of any such house, being about to quit the same, shall have wilfully omitted, or shall have neglected to apply, at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell exciseable liquors by retail, to be drunk or consumed in such house . . . . it shall be lawful for the justices assembled at a special session . . . . to grant to any new tenant or occupier of any house so becoming unoccupied . . . . a licence to sell exciseable liquors by retail, to be drunk or consumed in such house, or the premises thereunto belonging . . . . provided always, that every such licence shall continue in force only from the day on which it shall be granted until (elsewhere than in Middlesex or Surrey) the 10th day of October, then next ensuing."

By s. 8 of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27): "No application for a certificate under this Act in respect of a licence to sell by retail, beer, cider, or wine, not to be consumed on the premises, shall be refused, except upon one or more of the following grounds, viz.:—

"(1.) That the applicant has failed to produce satisfactory evidence of good character:

"(2.) That the house or shop in respect of which a licence is sought, or any adjacent house or shop owned or occupied by the person applying for a licence, is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character:

"(3.) That the applicant having previously held a licence for the sale of wine, spirits, beer, or cider, the same has been forfeited for his misconduct, or that he has through misconduct been at any time previously adjudged disqualified from receiving any such licence, or from selling any of the said articles:

"(4.) That the applicant, or the house in respect of which he applies, is not duly qualified as by law is required."

By s. 19: "Where on the 1st day of May, 1869, a licence under any of the said recited Acts is in force with respect to any house or shop for the sale by retail therein of beer, cider, or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premises in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine not to be consumed on the premises, may be refused, in accordance with this Act."

By s. 7 of the Wine and Beerhouse Act Amendment Act, 1870 (33 & 34 Vict. c. 29): "The 19th section of the principal Act shall extend to licences granted by way of renewal from time to time of licences in force on the 1st day of May, 1869, whether such licences continue to be held by the same person or have been or may be transferred to any other person or persons."

By s. 3, of 34 & 35 Vict. c. 88: "Whereas under the Wine and Beerhouse Act, 1869, and the Wine and

justices had already refused the application of Faulkner for a renewal of the licence. But, admitting that the respondent had a locus standi under s. 14, still s. 19 of the Act of 1869 does not apply, because the licence was not "in force," within the meaning of that section, at the time when the respondent's application was made. The application was made on November 17, 1891, in pursuance of a notice given on October 9, but the application does not relate back to the date of the notice. When the application was made the licence had already expired by effluxion of time, and was no longer "in force." A licence "in force" within s. 19 means a licence which was in existence on May 1, 1869, which has been kept alive ever since by successive renewals, and is still in existence at the time when the application is made to the justices. This construction was given to s. 19 by the legislature in s. 7 of the Act of 1870, and s. 3 of the Act of 1871. It is true that the Act of 1871 was wholly repealed by the Licensing Act of 1872, but that can hardly affect the statutory construction given by the Act of 1871 to s. 19 of the Act of 1869. This, however, may be immaterial, because the same construction has been judicially given to s. 19, independently of the Acts of 1870 and 1871: *Hargreaves* v. *Dawson* (1); *Reg.* v. *Curzon.* (2) In *Hargreaves v. Dawson* (1) the licence had been forfeited, and a much longer time had elapsed than in the

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Beerhouse Act Amendment Act, 1870, justices are prohibited, in the case of any house or shop with respect to which a licence for the sale by retail therein of beer, cider, or wine was in force on the 1st day of May, 1869, from refusing an application for a certificate in respect of such house, except upon the grounds therein mentioned, and doubts having arisen whether such prohibition extends to the case of an application for a certificate with respect to any such house or shop, if the licence which was in force on the 1st day of May, 1869, or any certificate since granted in respect of the said house or shop, has by forfeiture, lapse of time, or otherwise ceased to be in force, and it is expedient to remove such doubts: It is therefore hereby declared, that in the case of any such application the justices may, in their discretion, refuse the application upon any ground upon which they might refuse the application if made for a certificate with respect to any house or shop, with respect to which a licence was not in force on the 1st day of May, 1869."

This Act was repealed in toto by the Licensing Act, 1872, 35 & 36 Vict. c. 94.

(1) 24 L. T. (N.S.) 428.

(2) Law Rep. 8 Q. B. 400.

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present case before the application was made; but, if it is necessary that the licence should be actually in existence at the time when the application is made, the length of the interval during which it has not been in existence is immaterial. The question is, was the licence "in force" at the date of the application? In the present case the answer to that question must be, No. *Reg.* v. *Moore* (1) has not much bearing on the present case. *Reg.* v. *Justices of Liverpool* (2) turned on the construction of s. 14 of 9 Geo. 4, c. 91, and does not touch the present point. The argument for the respondent must be this, that, though a licence has expired, it is still "in force" within s. 19 of the Act of 1869, if an application can be made under s. 14 for its renewal. *Reg.* v. *Justices of the West Riding* (3) is a direct authority to the contrary.

Finlay, Q.C., *Poland, Q.C.*, and *J. M. Yates*, for the respondent. Sect. 19 of the Act of 1869 was intended to preserve vested interests. Formerly any one (with a few exceptions), could as a matter of right obtain an excise licence for a beerhouse; no certificate of justices was required. The Act of 1869 prevents the granting of an excise licence without a certificate from justices; but s. 19 limits the discretion of the justices as regards vested interests.

The judgment of the Divisional Court is founded upon the distinction between an application under s. 14 of the Act of 9 Geo. 4, and an application to the annual licensing sessions after the expiration of a licence. An application under s. 14 contemplates a quasi extension of the term of the licence for the purpose of obtaining a transfer. And the decisions upon that section shew that, if a new tenant has come into possession before the expiration of the licence, it is immaterial that his application for a renewal is heard after the expiration of the licence. And, if the tenant in possession will not apply for a renewal, s. 14 enables the landlord to do so. If the argument of the applicants is well founded, a tenant, if he desires to injure his landlord, can, by not applying for a renewal, deprive the landlord of the vested right which it was the object of s. 19 to preserve

(1) 7 Q. B. D. 542. (2) 11 Q. B. D. 638.
(3) 21 Q. B. D. 258.

to him. So long as there is a right to apply under s. 14 of 9 Geo. 4, c. 61, for a transfer, the licence is "in force" within the meaning of s. 19 of the Act of 1869. In the present case the licence was in existence when the former tenant Faulkner removed. This distinguishes the case from *Reg.* v. *Curzon* (1). In *Reg.* v. *Justices of Middlesex* (2), it was held that s. 14 applies to a case in which possession is yielded up by one tenant to another. *Simpkin* v. *Justices of Birmingham* (3) is distinguishable, because the removal of the tenant took place after the expiration of his licence. In *Hargreaves* v. *Dawson* (4), the application was not made till a year after the licence had dropped.

LORD ESHER, M.R. The case has been thoroughly argued out before us, and I have come to the conclusion that the decision of the Divisional Court is erroneous. We have to construe two sections in two Acts of Parliament. The first is s. 14 in the Act 9 Geo. 4, c. 61. It is admitted on all hands that s. 14 includes the present case up to a certain point—that it gave the respondent a locus standi before the justices to apply for a transfer. I entirely agree in that view. But does s. 14 do any more than that? It appears to me that, if you read the section over and over again, you cannot say that it does anything more than provide who are to be proper applicants; it makes no provision for what the justices are to do with the application when it is made.

The cases relied upon on behalf of the respondent turned upon the construction of s. 14.

The question then arises, how ought the justices to deal with the application when it comes before them? They have a proper applicant before them; how are they to deal with his application? Sect. 19 of the Act of 1869 limits their discretion in certain cases; but, unless the case is brought within that section, their discretion to refuse the application is not limited to the four grounds mentioned in s. 8. The only question, therefore, is, whether, on the true construction of s. 19, the present case falls within it? The words are "Where on the 1st of May, 1869,

(1) Law Rep. 8 Q. B. 400.
(2) Law Rep. 6 Q. B. 781.
(3) Law Rep. 7 Q. B. 483.
(4) 24 L. T. (N.S.) 428.

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a licence under any of the said recited Acts *is in force* with respect to any house or shop." The grammar of that clause is very insufficient unless the words mean "was on the 1st of May, 1869, and has since continued, and still is, in force." I should have thought that was the true construction, even if s. 19 had stood alone. But s. 7 of the Act of 1870 appears to treat s. 19 as having the meaning which I should have attributed to it independently. Then again, in both *Hargreaves* v. *Dawson* (1), and *Reg.* v. *Curzon* (2), the words "is in force" were construed as meaning "was in force on the 1st of May, 1869, and has continued in force up to, and is in existence at, the time when the application is made." Unless we can overrule those cases, that is the true construction. In my opinion we cannot overrule them, and they govern the present case. Sect. 19 does not apply, and the discretion of the justices was in no way limited. Consequently, the appeal must be allowed, and the order of the quarter sessions quashed.

LINDLEY, L.J. I am entirely of the same opinion, and I shall add very little to what the Master of the Rolls has said. The question turns upon the construction of three words in s. 19—"is in force." What is the meaning of those words? The Act came into operation after May 1, 1869. The words might have meant simply "was in force on the 1st of May, 1869," and nothing more. Is that the meaning? The answer must be, Certainly not. Sect. 7 of the Act of 1870 shews that that is not the true meaning, and that the meaning is "was in force on the 1st of May, 1869, and has been continued by successive renewals, and is still in force" at the time when the application is made. The licence must have been in force on May 1, 1869, must have been kept alive ever since, and must be in existence at the time when the application is made. When once we arrive at that conclusion there is an end of the present case. An attempt has been made to support the opposite construction of s. 19 by a totally different line of cases—cases decided upon s. 14 of the Act of Geo. 4. The locus standi of the applicant is given to him by s. 14. But what was the jurisdiction of the justices to deal

(1) 24 L. T. (N.S.) 428. (2) Law Rep. 8 Q. B. 400.

with his application? The answer must be, that they were in no way tied down by s. 19. The appeal must be allowed.

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LOPES, L.J. The question is, what is the true construction of s. 19? It appears to me that s. 19 has no application to this case. Sect. 19 applies only when a licence is "in force" at the date of the application to the justices. Here the licence was not in force at that date, it had lapsed previously. Consequently, the jurisdiction of the justices was not limited by s. 19, but was as extensive as in cases which are not governed by that section. Sect. 14 of the Act of Geo. 4, deals only with the persons who may make the application.

Appeal allowed.

Solicitors: *Solicitor to the Treasury; Crowders & Vizard.*

W. L. C.

[IN THE COURT OF APPEAL.]

C. A. 1893 *March* 14, 15.

GRAHAM AND WIFE *v.* MAYOR, &c., OF NEWCASTLE-UPON-TYNE.

Local Government—Practice—Limitation of Action—Urban Authority—Surveyors of Highways under Local Act—5 & 6 Wm. 4, c. 50 (Highway Act, 1835), s. 109—38 & 39 Vict. c. 55 (Public Health Act, 1875), ss. 144, 264.

By a local Act passed in 1853 the corporation of Newcastle-upon-Tyne were constituted surveyors of highways within the borough, with all the powers and authorities and subject to all the liabilities of surveyors of highways under the laws for the time being in force. By s. 109 of the Highway Act, 1835, the period within which any action may be brought for anything done under the authority of that Act is limited to three months after the fact committed for which the action is brought. By s. 144 of the Public Health Act, 1875, urban authorities (including by s. 6 corporations of boroughs) are constituted surveyors of highways within their district, and are to have, exercise, and be subject to all the powers, authorities, duties, and liabilities (so far as the same are not inconsistent with the provisions of that Act) of surveyors of highways under the law for the time being in force. By s. 264 the period within which an action may be brought for anything done under the provisions of that Act is limited to six months after the accruing of the cause of action.

In an action against the corporation for negligence, as surveyors of highways, commenced more than three but less than six months after the cause of action accrued:—

Held, that the defendants, as surveyors of highways, were entitled to rely on

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the limitation of three months provided by s. 109 of the Highway Act, 1835, and therefore that the action could not be maintained.

Burton v. *Mayor and Corporation of Salford* (11 Q. B. D. 286) approved.

Taylor v. *Meltham Local Board* (47 L. J. (C.P.) 12) and *Kay* v. *Atherton Local Board* (42 J. P. 792) overruled.

APPEAL from the decision of a Divisional Court (Lord Coleridge, C.J., and Cave, J.), dismissing an appeal from a judgment of the county court judge of Newcastle-upon-Tyne in favour of the defendants.

The action was brought against the defendants as surveyors of highways within their district to recover damages for injuries sustained by the female plaintiff. In January, 1892, there had been a heavy fall of snow, and the defendants had cleared the snow from many of the streets in Newcastle and had carted it to Dalton Street, where it was piled up into a heap or bank along one side of the street. The plaintiffs were on January 22, 1892, being driven down Dalton Street after dark, when the vehicle in which they were came into collision with the bank of snow and was upset, the female plaintiff being injured. The action was commenced in the county court on July 13, 1892. At the trial the learned county court judge found that there had been negligence on the part of the defendants as surveyors of highways, and that there had been no contributory negligence on the part of the plaintiffs, and against these findings the defendants did not appeal; but he also found that the action should have been brought within three months of the committing of the act of negligence, as required by s. 109 of the Highway Act, 1835, and accordingly gave judgment for the defendants. (1) The

(1) By s. 17 of the Newcastle-upon-Tyne Improvement Act, 1853 (16 & 17 Vict. c. clxxxii.), the council of the borough for the time being were made surveyors of highways within the borough, with all the powers and authorities and subject to all the liabilities of surveyors of highways under the laws for the time being in force.

By 5 & 6 Wm. 4, c. 50 (The Highway Act, 1835), s. 26: "If any impediment or obstruction shall arise in any highways from accumulation of snow . . . . the surveyor is required from time to time, and within twenty-four hours after notice thereof from any justice of the peace of the county in which the parish may be situate, to cause the same to be removed." By s. 109, "No action or suit shall be commenced against any person for anything done in pursuance of or under the authority of this Act . . . . after three calendar months next after the

Divisional Court affirmed this decision, but gave leave to appeal. (1)

Lowenthal, for the plaintiffs. The action was properly brought within six months of the accruing of the cause of action. The defendants now act as surveyors of highways under s. 144 of the Public Health Act, which invests them with all powers of surveyors of highways that are not contrary to the provisions of that Act, and the effect of s. 264 is that the three months' limitation contained in s. 109 of the Highway Act has ceased to be applicable to corporations to which the Public Health Act applies. The case is within *Taylor* v. *Meltham Local Board* (2), where the act done by the defendants was one which they had power to do under the Highway Act but it was held that under the Public Health Act the plaintiff had six months in which to bring his action. The decision in *Burton* v. *Mayor, &c., of Salford* (3), if it is to a contrary effect, should be overruled. [He also cited *Kay* v. *Atherton Local Board.* (4)]

Channell, Q.C., and *John Strachan*, for the defendants, were not called upon to argue.

LORD ESHER, M.R. I am of opinion that this appeal should be dismissed. The case is a perfectly clear one, and, in my judgment, the proper way to treat the question is for us to make up our minds whether we agree with the decision of Grove and Denman, JJ., in *Taylor* v. *Meltham Local Board* (2), or with that

fact committed for which such action or suit shall be so brought."

By 38 & 39 Vict. c. 55 (The Public Health Act, 1875), s. 144, every urban authority is to be surveyor of highways within its district. By s. 264 an action against a local authority for anything done or intended to be done or omitted to be done under the provisions of the Act is to be commenced within six months next after the accruing of the cause of action, and not afterwards.

(1) The judgment of the Divisional Court proceeded on the ground that the notice of action was insufficient, the Court following with reluctance on that point the case of *Mason* v. *Birkenhead Improvement Commissioners* (6 H. & N. 72; 29 L. J. (Ex.) 407), a decision with which they stated that they did not agree, but which they could not satisfactorily distinguish. The point was not raised in the Court of Appeal.

(2) 47 L. J. (C.P.) 12.

(3) 11 Q. B. D. 286.

(4) 42 J. P. 792.

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of Cave, J., in *Burton* v. *Mayor, &c., of Salford.* (1) It is true that Cave, J., distinguished the two cases; but I must candidly say that, although it may have been necessary to distinguish them, the distinction appears to me to be a distinction without a difference, and that we must choose between the two decisions.

Now, how does the matter stand? In the first place we have the Highway Act of 1835, and then the Public Health Act, 1875, which does not assume to repeal the former Act, but leaves it untouched as to matters relating to highways; it makes certain local boards and corporations surveyors of highways within their districts, and leaves all other surveyors of highways untouched. The object of the Public Health Act, so far as it relates to highways, was not to invest surveyors of highways with novel powers, but to create a different sort of surveyor. A corporate surveyor of highways is brought into existence by the Public Health Act, and where this is the case such corporate surveyor acts under the Highway Act; and is therefore subject to all the liabilities and privileges of an individual surveyor of highways under that Act. There is a limitation of the time for bringing an action against a corporate surveyor of highways as there is for bringing an action against an individual surveyor under the Highway Act; as to the period of limitation we adopt the reasoning of Cave, J., in *Burton* v. *Mayor, &c., of Salford* (1), and apply it to this case, and hold that it is three months. In the present case there is this further important fact, that the liability to remove snow from highways is imposed by s. 26 of the Highway Act, and not by the Public Health Act. I do not think, however, that our decision ought to be based upon that fact, but that the simple ground for our decision ought to be that in respect of acts done by them as surveyors of highways the rights of a local authority are governed by the Highway Act. I do not, therefore, agree with the decision in *Taylor* v. *Meltham Local Board* (2), and think that it should be considered as overruled, and that we should adopt the decision of Cave, J., in *Burton* v. *Mayor, &c., of Salford.* (1)

(1) 11 Q. B. D. 286. (2) 47 L. J. (C.P.) 12.

Of course, it follows that *Kay* v. *Atherton Local Board* (1) must also be treated as overruled.

LINDLEY, L.J. I am of the same opinion. The question under which Act were the defendants acting in removing the snow, admits of an easy answer: they were obviously acting under the Highway Act, and not under the Public Health Act. In the present case it must not escape attention that the defendants in fact derived their authority as surveyors of highways from the local Act of 1853, and not from the Public Health Act, and the case is therefore in that respect on all fours with that of *Burton* v. *Mayor, &c., of Salford.* (2) But, apart from the local Act, even if the defendants had originally become surveyors of highways under the Public Health Act the result would have been the same. Upon the question of the true construction of the statutes, I agree with the decision in *Burton* v. *Mayor, &c., of Salford* (2), and dissent from that in *Taylor* v. *Meltham Local Board* (3) and *Kay* v. *Atherton Local Board.* (1)

LOPES, L.J. I am of the same opinion. Even if the Public Health Act constituted this local board the surveyor of highways within its district, when so constituted it acted under the Highway Act, 1835, just as an individual surveyor acted under it. That really disposes of this case. But this decision may be upheld on a narrower ground. The provisions as to the removal of snow from highways are to be found in s. 26 of the Highway Act, and it would be quite sufficient if a surveyor bonâ fide believed, upon reasonable grounds, that he was acting under that section; in the present case there can be no doubt whatever that as a matter of fact he did act under it. The principle which the Courts have followed for very many years in such cases is, that if the surveyor acts, or bonâ fide believes on reasonable grounds that he is acting, under a particular Act, that is the Act which supplies the period of limitation for bringing an action against him. I agree with what has been said as to the cases cited in argument: that *Burton* v. *Mayor*,

(1) 42 J. P. 792. (2) 11 Q. B. D. 286.
(3) 47 L. J. (C.P.) 12.

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&c., of Salford (1) should be adopted, and *Taylor* v. *Meltham Local Board* (2) and *Kay* v. *Atherton Local Board* (3) overruled.

Appeal dismissed.

Solicitors for plaintiffs: *Dix & Warlow, for Keenlyside & Co., Newcastle.*

Solicitors for defendants: *Collyer-Bristow & Co., for Hill Motum, Town Clerk, Newcastle.*

W. J. B.

C. A. 1893 *Feb.* 24.

[IN THE COURT OF APPEAL.]

IN RE POTTS. EX PARTE TAYLOR.

Bankruptcy—"Secured Creditor"—Judgment Creditor—Equitable Execution—Order appointing Receiver of Debtor's Interest in Residuary Estate under a Will—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 10, 45, 168.

Judgment creditors obtained, in the action in which they had recovered the judgment, an ex parte order appointing a receiver, to receive the moneys receivable in respect of the share to which the debtor was entitled in the residuary estate under the will of his mother; and it was ordered that the receiver should pay the balance or balances appearing due on his accounts, or such part thereof as should be certified as proper to be so paid, in or towards satisfaction of what should for the time being be due in respect of the judgment. After the order had been made, notice of it was served upon the executors of the mother. Before any payment had been made by the executors to the receiver on account of the debtor's share, a receiving order in bankruptcy was made against him, and he was soon afterwards adjudicated a bankrupt:—

Held, that the order appointing a receiver did not make the judgment creditors "secured creditors" within the meaning of ss. 9 and 168 of the Bankruptcy Act, 1883; that the order did not amount to a delivery of the share in equitable execution to the judgment creditors; and that they had by virtue of the order no priority over the other creditors of the bankrupt.

Such an order appointing a receiver ought not to be made ex parte.

APPLICATION by Daniel Taylor & Sons for a declaration that they were secured creditors of F. C. Potts, a bankrupt, in respect of the share to which he was entitled in the residuary estate of his mother under her will, by virtue of an order appointing a receiver of such share.

The following statement of facts was agreed upon. On July 25,

(1) 11 Q. B. D. 286. (2) 47 L. J. (C.P.) 12.
(3) 42 J. P. 792.

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1891, Taylor & Sons recovered judgment against Potts in an action in the Queen's Bench Division, for 316*l.* 15*s.* for goods sold and delivered and 7*l.* 10*s.* costs. They issued execution upon the judgment against the goods of Potts, but failed to recover anything. On September 3, 1891, the judgment was registered as a lis pendens, and on September 9, 1891, it was registered at the Middlesex Registry. On January 10, 1892, Potts' mother died, and he thereupon became entitled under her will to a share in her residuary real and personal estate. The will was proved by her executors on March 31, 1892. Her estate consisted of realty and personalty, and there was a trust for conversion of it into money. On March 31, 1892, Taylor & Sons, by a summons in the action, obtained from Pollock, B., an ex parte order, appointing E. C. Moore, upon his giving security, "receiver to receive the moneys receivable in respect of the following property—that is to say, the share to which the defendant is entitled in the residuary estate under the will of his mother, Amelia Ann Potts." The appointment was to be without prejudice to the rights of any prior incumbrancers upon the share. The receiver was to have liberty, if he should think proper (but not otherwise), out of the rents, profits, and moneys to be received by him to keep down the interest upon the prior incumbrances according to their priorities, and was to be allowed such payments (if any) in passing his accounts. Directions were given as to the passing of the receiver's accounts, and it was ordered that the receiver should "pay the balance or balances appearing due on the accounts left, or such part thereof as shall be certified as proper to be so paid, such sums to be paid in or towards satisfaction of what shall, for the time being, be due in respect of the judgment signed on July 25, 1891, for the sum of 316*l.* 15*s.* debt and 7*l.* 10*s.* for costs." Directions were given as to the payment of costs, and it was ordered that the balance (if any) remaining in the hands of the receiver, after making the several payments before directed, should forthwith be paid by him into Court to the credit of the action, subject to further order.

Notice of this order was served on one of the executors on April 4, and on the other on April 6, 1892. On May 16, 1892,

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a receiving order was made against Potts on his own petition, and on May 19 he was adjudicated a bankrupt. On October 26, 1892, Taylor & Sons gave notice of motion for the above-mentioned declaration. At that time the executors had got in and converted the estate of the testatrix, and were in a position to distribute it among the persons entitled thereto; but no payment had been made by them either to the receiver or to the trustee in the bankruptcy.

Herbert Reed, Q.C., and *Micklem*, for the judgment creditors.
Muir Mackenzie, for the trustee in the bankruptcy.

1893. Jan. 30. VAUGHAN WILLIAMS, J. I am of opinion that the applicants are not entitled to the order for which they ask. The case was argued principally with reference to the 45th section of the Act, and it was contended that equitable execution of the character in this case is execution within the meaning of s. 45, and that the execution had been completed, and that under those circumstances the applicants were by the very terms of the section entitled to the benefit of the execution. In my judgment the position of the applicants is not that of creditors who have issued execution within the meaning of the section. I think the section only applies to the cases which are specified in it, and that this is not one of those cases. That being so, the only remaining question is, whether the applicants are "secured creditors." I think they are not. The 9th section of the Act provides that "on the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court, and on such terms as the Court may impose. But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security." The result is that, if a creditor is not a secured creditor, this 9th section debars him from taking advantage of any legal process

against the bankrupt; and the 10th section expressly provides for the staying of any process which is in course of execution. That being so, I have only to ascertain what is the definition of a "secured creditor," and to see whether the applicants bring themselves within it. The definition of a "secured creditor" is found in the 168th section, which enacts: "a 'secured creditor' means a person holding a mortgage, charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor." In my opinion, the result of what has happened in this case has not been to make the applicants "secured creditors" within the meaning of that definition. What happened was this: [The learned judge stated the facts, and continued:—] Now, I think that *In re Dickinson* (1), although it is in some respects a decision upon the particular order which was brought before the Court in that case, yet does decide some matters generally with regard to the effect of a receivership order obtained by a judgment creditor for the purpose of what is called an equitable execution. It seems to me that that case does plainly decide that such an order does not make the creditor who obtains it a "secured creditor" within s. 9 of the Act. Cave, J., in his judgment in *In re Tillett* (2), takes the same view. He says: "I have no doubt that Mr. Kingscote's advisers desired to obtain for him, and thought they had obtained, a security available in case of Tillett's bankruptcy by the order for a receiver of May 14, 1887; but, after the recent decision of the Court of Appeal of *In re Dickinson* (1), it is clear that that order gave Mr. Kingscote no such security." But it is said that I ought not to treat *In re Dickinson* (1) as having decided that a person who has obtained such an order is not a "secured creditor" within the meaning of the Bankruptcy Act, because the later decision of the Court of Appeal in *Levasseur* v. *Mason and Barry* (3) has shewn that *In re Dickinson* (1) did not decide any such general proposition, but was merely a decision as to the effect of the particular and somewhat imperfect order which had been obtained in that case. I do not, however, so understand the judgment in *Levasseur* v. *Mason*

(1) 22 Q. B. D. 187. (2) 6 Mor. B. C. 70.
(3) [1891] 2 Q. B. 73.

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and Barry. (1) I am very far from saying that there are not expressions in the judgment of Lord Esher, M.R., which look as if he was speaking of the judgment creditors who had obtained the receivership order as having obtained by that means rights with regard to the goods mentioned in it which made them "secured creditors"; but he in no part of his judgment decides anything of the sort. On the contrary, *In re Dickinson* (2) was cited to him, and he does not in the course of his judgment say a single word in terms qualifying his previous decision in that case; and both Lord Coleridge, C.J., and Fry, L.J., in their judgments, take a view of the effect of the receivership order which is entirely consistent with the decision in *In re Dickinson.* (2) Lord Coleridge, C.J., says: "The present defendants who obtained the order could not have execution upon their judgment, because the property upon which the order operated was in the hands of persons who had a lien on it. The property itself, therefore, could not be taken in execution; but the right to get execution upon it, when all legal impediments were removed, was ascertained by the receivership order." It seems to me that that is a true statement of the effect of a receivership order. It gives the person who obtains the order the right to execution on the property as soon as the legal impediments to execution have been removed; but it does not alter the property in the goods. It leaves the property in the goods where it was. It does not give the person who obtained the order any lien upon the goods, but it places them in the custody of the receiver. Under such circumstances the debtor could not, after the receivership order had been made, make any disposition of his property which should override the rights of the persons who were before the Court for the purpose of obtaining that order. In the old days, when proceedings had to be taken in equity to get rid of a legal impediment, a Court of Equity, as I understand, would never have allowed the property, which was in the hands of the law, to be disposed of by the execution debtor in a way inconsistent with the rights of the plaintiff in that procedure. But that is a very different thing from saying that the plaintiff had any property in the goods or any lien upon the goods which were in the hands

(1) [1891] 2 Q. B. 73. (2) 22 Q. B. D. 187.

of the receiver. The real fact is, that the property which is in the hands of the receiver is held by the Court in medio until the rights of the plaintiff (as it would have been in the old proceeding) have been determined; but until that has been done, and the proceeds of the sale of the property by the receiver have been handed over by him to the person who obtained the order, in my judgment he acquires no property in, no lien, and no charge whatever on that which is the subject-matter of the order. It follows, therefore, that this application must be refused with costs.

H. L. F.

The judgment creditors appealed.

1893. Feb. 24. *Herbert Reed, Q.C.*, and *Micklem*, for the appellants. By virtue of the order appointing a receiver, the appellants became entitled as against the bankrupt to payment of their debt out of his share of the residue of his mother's estate. The order made them "secured creditors" within the meaning of s. 9 (1) of the Bankruptcy Act, 1883. On the face of it the

(1.) Sect. 9: "(1.) On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court, and on such terms as the Court may impose.

"(2.) But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

Sect. 10: "(2.) The Court may at any time after the presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just."

Sect. 45: "(1.) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

"(2.) For the purposes of this Act, an execution against goods is completed by seizure and sale; an

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order was complete; there was nothing further to be done to perfect the right which it gave to the appellants. This distinguishes the present case from *In re Dickinson* (1), upon the authority of which Vaughan Williams, J., proceeded; for in that case there was only an appointment of a receiver, all rights being expressly reserved. The trustee in the bankruptcy can take only the rights which the debtor himself had, unless the Bankruptcy Act gives him a higher right, and, if the appellants are "secured creditors," their security is unaffected by s. 9. If the bankrupt had before the bankruptcy made an assignment of his interest under his mother's will, it would have been a valid equitable assignment, and the order appointing a receiver and directing him to pay the appellants is as effectual. Courts of Equity have in a variety of cases lent their aid, by the appointment of receivers and otherwise, to enforce the judgments of the Courts of Common Law: Mitford on Pleadings (5th ed.), p. 148; *Angell* v. *Draper* (2); *Lewkner* v. *Freeman* (3); *Davidson* v. *Foley* (4); *Lord Dillon* v. *Plaskett* (5); *Watts* v. *Jefferyes* (6); *Smith* v. *Hurst* (7); *Thornton* v. *Finch* (8); *Macnicoll* v. *Parnell* (9); *In re Peace* (10); *Crowe* v. *Price* (11); *Fuggle* v. *Bland* (12); *Westhead* v. *Riley* (13); *Tillett* v. *Pearson* (14); *In re Cooper* (15); *In re Cowan's Estate* (16); *Brereton* v. *Edwards.* (17)

[LORD ESHER, M.R., referred to *Ex parte Evans.* (18)]

There was jurisdiction to make the order ex parte; at any rate, it is effectual while it stands, and no attempt has been made

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attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver."

Sect. 168: "In this Act, unless the context otherwise requires (inter alia), 'secured creditor' means a person holding a mortgage, charge, or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor."

(1) 22 Q. B. D. 187.
(2) 1 Vern. 398.
(3) Prec. Ch. 105.
(4) 2 Bro. C. C. 203.
(5) 2 Bli. (N.S.) 239.
(6) 3 Mac. & G. 372.
(7) 1 Coll. 705.
(8) 4 Giff. 515.
(9) 35 W. R. 773.
(10) 24 Ch. D. 405.
(11) 22 Q. B. D. 429.
(12) 11 Q. B. D. 711.
(13) 25 Ch. D. 413.
(14) 22 W. R. 209.
(15) 60 L. T. (N.S.) 95.
(16) 14 Ch. D. 638.
(17) 21 Q. B. D. 226, 488.
(18) 13 Ch. D. 252.

to set it aside. The order amounts to an actual delivery in "equitable execution" to the appellants of the debtor's interest under his mother's will. In *In re Dickinson* (1) there was either no "equitable execution," or the execution was not completed by what is equivalent to sale under a fi. fa. The right to a legacy accrues to the legatee immediately upon the death of the testator, and that right has in this case been bound by an "equitable execution." The receiver has really got hold of the fund. No one else is entitled to receive it, and the executors cannot properly pay it to any one else. An order appointing a receiver of the rents of land is a delivery in execution in equity: *Anglo-Italian Bank* v. *Davies*. (2) For the present purpose there is no distinction between rents of land and a share of residue of personal estate. The order creates either a "charge" or a "lien" on the bankrupt's interest under the will; it had the effect of a delivery of the property in question to the appellants: *Levasseur* v. *Mason and Barry* (3); and they are secured creditors. The order operated from its date: *Ex parte Evans*. (4) If the executors refused to pay the bankrupt's share to the receiver, it would no doubt be necessary to apply to the Court for a positive order upon them to pay him, and they would probably have to pay the costs.

[LINDLEY, L.J. Have you a charge upon the fund before you have obtained such an order?]

In *Ex parte Evans* (4) it was held that under an order appointing a receiver of rents of land the rents were bound as from the date of the order. It is not necessary to serve the person who has to pay with notice of the application for the order. Notice of the order was served on the executors, and that is sufficient. Sect. 45 was necessary in order to deprive an execution creditor of the right which he would acquire by seizure alone, and to impose on him the obligation of proceeding to a sale. There is no such provision as to equitable execution. But, if s. 45 applies by analogy to equitable execution, then this order is equivalent to seizure and sale under a legal execution.

Muir Mackenzie, (*Sir C. Russell, A.G.*, with him), for the trustee

(1) 22 Q. B. D. 187.
(2) 9 Ch. D. 275.
(3) [1891] 2 Q. B. 73.
(4) 13 Ch. D. 252.

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in the bankruptcy. Sect. 45 has no application here. The bankrupt's interest under his mother's will was not an interest in land; the real estate of the mother was to be converted into money.

The appointment of the receiver did not transfer to Taylor & Sons any interest in the property so as to make them secured creditors, and the title of the trustee in the bankruptcy which has intervened prevents them from becoming secured creditors. The effect of the order is only to prevent the debtor from receiving the money, and to confer on the receiver a right to receive it. It is a "process" against the estate of the debtor within s. 10 of the Bankruptcy Act. "Equitable execution" is not really execution at all: *In re Shephard.* (1) In *Levasseur* v. *Mason and Barry* (2), the liquidation was a foreign one, and ss. 9 and 10 of the Bankruptcy Act did not apply. Here the trustee claims by a higher title property which has ceased to be the bankrupt's: *In re Tillett.* (3) In *Ex parte Evans* (4) a receiver was appointed of an equitable interest in land, and the point of the decision was, that it was not necessary to sue out an elegit.

Herbert Reed, Q.C., in reply. *In re Dickinson* (5) was only a decision on the particular facts of the case.

LORD ESHER, M.R. Messrs. Taylor & Sons, who are judgment creditors of the bankrupt Potts, ask for a declaration that they are "secured creditors" in the bankruptcy, and that they have therefore a right as against the other creditors to be first paid out of a fund which forms part of the bankrupt's estate. Taylor & Sons were judgment creditors of Potts, and after they had recovered judgment, and before the bankruptcy, Potts' mother died, leaving real and personal property, and by the terms of her will her executors were to sell everything, and, having reduced everything into money, they were to pay her debts and the legacies bequeathed by her will, and then, if there remained in their hands any residue, Potts was to be entitled to a share of that

(1) 43 Ch. D. 131.
(2) [1891] 2 Q. B. 73.
(3) 6 Mor. B. C. 70.
(4) 13 Ch. D. 252.
(5) 22 Q. B. D. 187.

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residuary money. That being the state of things, Taylor & Sons procured an ex parte order of the Court appointing a receiver of Potts' share of his mother's estate, and the order directed the receiver, if the executors should pay the money into his hands, to pay it over, not to Potts, but to Taylor & Sons. There is nothing in the order which says that the executors are to pay the money to the receiver; the order does not bind the executors, and it would be absolutely unjust if it did, because they were not made parties to the summons, and had no opportunity of being heard upon it, and therefore, as might be expected, no order was made upon them. It is only an order, therefore, that the money (if any) which comes into the hands of the receiver shall be paid by him, not to Potts, but to Taylor & Sons. Whilst that order was standing, and before anything was done under it, a receiving order in bankruptcy was made against Potts, and he was adjudged a bankrupt. Then arises the question between the trustee in the bankruptcy and Taylor & Sons, whether this money, which is at some time or other to come to Potts, and which forms part of his estate, passes to the trustee in the bankruptcy, or whether it is to be paid to Taylor & Sons. That is a question under the bankruptcy law. The bankruptcy law is not the common law of England; it is an enacted law, and all the rights under it are determined by statute and by nothing else. In the present case the governing section of the Act is s. 9, and the trustee in the bankruptcy, under sub-s. 1 of that section, claims this money as part of the estate of the bankrupt.

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Sub-sect. 1 says that, "On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor" (that is, all his property), "and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court, and on such terms as the Court may impose." The order appointing a receiver is a remedy which these creditors had against the debtor's property, and if sub-s. 1 stood alone, they are to have no remedy against his property; therefore, they cannot have this

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remedy. But then comes sub-s. 2: "But this section shall not affect the power of"—whom? Not of any person who has obtained an order appointing a receiver, or who has obtained "equitable execution," whatever that may mean, but "shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

Now, what would have been the right of Taylor & Sons under this order if they were "secured creditors" by virtue of it? They would have had a right to insist that the receiver when he had received the money should pay it over to them, and if the receiver did not pay it over, they would have had a right as against the receiver to some remedy given them by the Court. But we must see what the term "secured creditor" means in sub-s. 2. The interpretation clause, s. 168, says that "'secured creditor' means" (it does not say "includes," and therefore it confines the meaning of "secured creditor" in sub-s. 2 to those things only which are mentioned in s. 168) "a person holding a mortgage, charge, or lien on the property of the debtor." It cannot be said Taylor & Sons held a "mortgage on the property of the debtor." That these creditors had a common law lien on the property of the debtor cannot be maintained for a moment. Had they an equitable lien? Is there any appreciable distinction between an equitable lien and an equitable charge? Does this order amount to either an equitable lien or an equitable charge, if there be any distinction between them? A charge is a well-known thing. If one man owes a debt to another, a creditor of the latter can, by bringing in the debtor, charge the debt in his hands so as to prevent him from paying it to his own creditor, and oblige him to pay it to the creditor who obtains the charge. Why is that a charge? Because it charges the debt in the hands of the man who has to pay it. Does this order, then, create an equitable charge? Does it come within the proper definition of a charge? If it had charged the money in the hands of the executors, and had ordered them not to pay it to Potts, but to pay it to the receiver, although it might not create a common law charge, or a charge within the meaning of any of the statutes

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which create charges, it might still perhaps amount to an equitable charge. But does it do so? Is it possible that in equity a man who has or will have money to pay to Potts can be bound to pay it to Taylor & Sons—that it should be charged in his hands so that he is obliged to pay it to Taylor & Sons, so that if he pays it otherwise he will be guilty of a contempt of Court, when he had no notice of the application for the order, and no opportunity of making any answer to it—was in no way a party to it? To my mind, it would be a wicked injustice if the order did in terms purport to bind the executors, and order them not to pay the money to any one but the receiver, when they had no opportunity of being heard in opposition to it. But it is said that after the order had been made behind the executors' backs, notice of it was served on them. Now if you do an act which is grossly unjust against a man, how can it bind him any the more if, after you have done it, you tell him that you have? If this really were an order upon the executors that they should only pay the receiver, and should not pay Potts, I should be inclined to say that it would be most unjust to make an order binding the executors without hearing them. But, in truth, when the order was asked for and made, no such injustice was proposed to the judge. The order does not bind the executors, and does not profess to bind them. It does not contain an order that they shall pay. It is right in form and just as it stands, because the executors were not summoned and had no notice before the order was made. What, then, is the effect of the order? It is not binding on the executors, and, in my opinion, it is not a charge within the meaning of s. 168. I think that that interpretation of s. 9 and of s. 168 was intended to be laid down by this Court in *In re Dickinson* (1), in words nearly identical with those which I have now used. An order appointing a receiver can only amount to a charge if it charges the person in whose hands the money is not to deal with it except in one way. In my opinion, therefore, this order was not a "charge," was not a "mortgage," and was not a "lien," either legal or equitable, and consequently Taylor & Sons were not "secured creditors" within the meaning of sub-s. 2 of s. 9, and by virtue of sub-s. 1 the bankruptcy took

(1) 22 Q. B. D. 187.

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away from them the right to receive this money in priority to the other creditors.

The judgment of Vaughan Williams, J., was right, and the appeal must be dismissed.

LINDLEY, L.J. The bankrupt was entitled under the will of his mother to a share of her residuary estate, which consisted of the proceeds of sale of real estate and personalty. He was not entitled to any real estate, nor to any interest in it which could be taken in execution; he was entitled to some money, his share under the will was money, and the agreed statement of facts shews that at the date of the application to the Court the executors had realized the assets and had turned them into money, and were ready to pay the bankrupt's share. Under these circumstances Taylor & Sons, having recovered judgment in an action against the bankrupt for a sum of money, obtained ex parte in that action an order appointing a receiver to receive what might be coming to the bankrupt under his mother's will, and also directing the receiver at certain specified times to pay the balances appearing due upon his accounts, or so much thereof as should be certified to be proper, in satisfaction of the judgment debt. The order being partly in print, I suppose it is a common form. Notice of that order was served on the executors, and the short question which we have to consider is, whether the effect of the order and of the notice was to give the judgment creditors an equitable charge or lien upon the judgment debtor's share under the will, so as to bring the judgment creditors within the definition of a "secured creditor" contained in s. 168 of the Bankruptcy Act. At one time during the argument I felt some little doubt about it. I was inclined to think that the appellants might make out that they were secured creditors by virtue of an equitable execution. But, as pointed out in *In re Shephard* (1), an order appointing a receiver is not the same thing as taking out execution. Such an order is not like a fi. fa.; it is something far short of that. The right way to obtain equitable execution against money in the hands of trustees was to file a bill, not only against your debtor, but also

(1) 43 Ch. D. 131.

against the person who had got the property which you wanted to attach. I cannot bring myself to think that an ex parte order such as this, even when followed by notice to the executors, creates an equitable charge or lien within the meaning of s. 168, which defines "secured creditor." It is simply an uncompleted process to obtain payment of money. It is not a charge, because there is no order upon the executors to pay the money. If they did not choose to pay it to the receiver they could not be attached for disobeying the order. It is true that by proper proceedings an order for payment could be obtained against them. It would be almost as of course, and, unless they could give some good reason for not paying the receiver, they would probably have to pay the costs of the application. But still the property was not yet the judgment creditors'; it was short of that; they had not acquired an equitable interest in the property as distinguished from a right to get it by a process which was not yet complete. Without going through the cases, it appears to me upon reflection that this order is something short of a charge, something short of making the applicants "secured creditors." See *Flegg* v. *Prentis*. (1) The order not constituting a charge or lien, notice of it did not make it so.

I am not sorry to come to this conclusion, for it strikes me that this is an attempt to obtain a new-fashioned charging order. We know what stop orders are; we know what charging orders are; they are governed by Acts of Parliament. When the learned judge made this order, I am sure that the very last thing he thought of was to give these creditors a charge; he never dreamed of such a thing. An attempt has been made to get a new sort of charging order by first of all having a receiver appointed ex parte, which is very irregular, and then giving the executors notice of it, so as to obtain the benefit of a charging order by a new process which ought not to be encouraged. The appeal must be dismissed.

BOWEN, L.J. I entirely agree. It seems to me that this is an experiment—an attempt to obtain a charge in a way which was never intended by the Acts of Parliament. The creditors sue

(1) [1892] 2 Ch. 428.

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their debtor and recover judgment, and, finding that the debtor has no goods upon which they can levy, they go to a judge at chambers, and ex parte obtain against the debtor an order appointing a receiver to receive moneys which had resulted from the sale of the estate of his mother, in the residue of which he was interested under her will.

To begin with, I think the order was improperly obtained ex parte. I do not mean improperly in the sense that there was a dishonest intention; but as a matter of practice it is improper that an order for the appointment of a receiver should be obtained ex parte, when there is really no danger to the property, nor any of the circumstances under which such orders used to be made ex parte in the Court of Chancery. But still, as between Taylor & Sons and Potts, the order, though it ought not to have been made, nevertheless was good. But to what does it amount, if it is good? It seems to me that it does not amount to the creation of an equitable interest in the nature of a charge upon the fund. It falls short of that. It is a mere direction to the receiver to receive money, and to pay it over to the creditors when he does receive it. There is nothing to create an interest in the fund, nor could such an interest, as it seems to me, be created by a judge at chambers in this way. If a judge at chambers intended to create a charge upon property, the least that would be expected is that the persons in whose hands the property is, and upon whom a burden is to be imposed with respect to it, should be parties to the proceeding. It seems to me that the order is, as my brother Lindley has described it, a step in a proceeding which was not complete.

LINDLEY, L.J. The appeal will be dismissed with costs.

Appeal dismissed.

Solicitors: *Layton, Sons, & Lendon; Solicitor to Board of Trade.*

W. L. C.

DELOBBEL-FLIPO *v.* VARTY. 1893 *April* 14.

Practice—Counter-claim in Tort—Bankruptcy of Defendant—Action stayed except as to Counter-claim—Power to remit Counter-claim to County Court for Trial—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 66.

A counter-claim, even where by reason of the original action having been stayed it is the sole matter remaining to be tried between the parties, is not an "action" within s. 66 of the County Courts Act, 1888, and the Court has no jurisdiction under that section to order it to be remitted for trial to the county court.

APPEAL from chambers.

The plaintiff brought an action in the High Court for the price of goods sold and delivered, and for breach of contract. The defendant counter-claimed for damages for breach of contract, and for slander. On December 21, 1892, after issue joined, the defendant was adjudicated a bankrupt; and on January 17, 1893, the Court of Bankruptcy ordered that the action should be stayed, except as to that portion of the counter-claim which related to the alleged slander. The plaintiff thereupon applied at chambers, under s. 66 of the County Courts Act, 1888 (1), for an order that the defendant should give security for the costs of his counter-claim, or that in default such counter-claim should be remitted for trial to the county court. The master refused to make the order. On appeal the judge referred the matter to the Divisional Court.

C. E. Jones, for the plaintiff. The counter-claim must, under the circumstances of the case, be treated as an action within the meaning of s. 66. As nothing now remains to be tried except the counter-claim, the position of the parties must be regarded

(1) Sect. 66 of the County Courts Act, 1888, provides that "It shall be lawful for any person against whom an action of tort is brought in the High Court to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant, should a verdict be not found for the plaintiff; and thereupon a judge of the High Court shall have power to make an order that, unless the plaintiff shall . . . . give full security for the defendant's costs . . . ., the action be remitted for trial before a Court to be named in the order, and thereupon the plaintiff shall lodge the original writ and the order with the registrar of such Court, ... and the action and all proceedings therein shall be tried and taken in such Court."

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as reversed. The case is like *Sykes* v. *Sacerdoti* (1), where, the plaintiff having discontinued his action, the Court of Appeal held that the defendant, a foreigner resident out of the jurisdiction, could be ordered to give security for the costs of his counter-claim on the ground that he was really the plaintiff. Lord Esher, M.R., said: "As matters now stand, the only person who is really a plaintiff is the original defendant—the actor in the counter-claim. The original plaintiff is defendant to the counter-claim, which is in the nature of a cross-action. . . . I am still firmly of opinion that when a claim and counter-claim arise out of different matters, the counter-claim is really a cross-action, though for convenience of procedure, the two are joined together, and are to be tried at the same time." Here the claim and counter-claim arose out of different matters. The defendant will probably rely on *Reg.* v. *Judge of City of London Court* (2), where it was held that a counter-claim in an action cannot, after the action has been discontinued, be remitted for trial to a county court under s. 65 of the County Courts Act, 1888. But the language of s. 65, upon which that case turned, differs from that of s. 66.

C. Rose-Innes, for the defendant, was not called upon.

WILLS, J. It might be desirable that we should have the power to make the order which is asked for. But the Act does not give us that power. We cannot hold that a counter-claim is an action within the meaning of s. 66, for this section says that "the plaintiff shall lodge the original writ and the order with the registrar," and it would be impossible to read the words "original writ" as including a counter-claim, even though the counter-claim be the only matter remaining to be tried.

CHARLES, J. I am of the same opinion.

Appeal dismissed.

Solicitor for the plaintiff: *W. Morley.*

Solicitor for the defendant: *H. Rose-Innes.*

(1) 15 Q. B. D. 423. (2) [1891] 2 Q. B. 71.

J. F. C.

ROBERTS *v.* HOLLAND. 1893 *April* 21.

Practice—Parties—Non-joinder of Plaintiffs—Action for Damage to Reversion —Action for Breach of Covenant—Severance of Reversion after Demise—Right of one Tenant in common to maintain Action.

Where a lease is granted by one person, containing a covenant with the lessor, which runs with the land, and after the execution of the lease the lessor devises his reversion in such a way that it becomes severed, and vests in several tenants in common, one of such tenants in common can maintain an action to recover damages, either for a wrongful act causing injury to the reversion, or for breach of the covenant, without joining the other tenants in common as plaintiffs.

ARGUMENT of points of law raised on the pleadings.

The action was brought to recover damages for wrongful acts causing injury to a reversion, and for breach of a covenant contained in a lease.

By the lease in question one Ellis Humphreys demised a farm to certain lessees, whose interest was now vested in the defendant Holland. By his will Humphreys left the reversion to his wife, for her life, and after her death to his six daughters. Humphreys and his wife were dead, and the interest of one of the daughters was vested in Roberts, the plaintiff.

As to the claim in tort for damages for injury to the reversion, the point raised was that the plaintiff, being only one of several tenants in common, could not maintain the action without joining his co-tenants in common as plaintiffs.

As to the claim for damages for breach of covenant, the point raised was that the covenant in question was with Ellis Humphreys, deceased, and not with the plaintiff; that the plaintiff's title to the reversion, if any, was as tenant in common with various other persons; that the plaintiff could not maintain the action in respect of such breaches of covenant, except jointly with such persons.

Gore, for the defendant. The plaintiff's cause of action fails, as to both branches of his claim, by reason of the non-joinder of the other tenants in common. Under the old practice a plea in abatement would have been successful, and therefore the

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plaintiff must fail, unless the co-tenants are joined under Order XVI., r. 11 (1). Here the lease was granted by Humphreys, and the covenant was made with Humphreys, and the authorities shew that in such a case all the representatives of the lessor or covenantee ought to join in order to enforce a remedy either in respect of the lease or on the covenant: Coke upon Littleton, 198 a; Bacon's Abridgement, Joint Tenants, K; *Pilley* v. *Robinson* (2); *Wilson, Sons, & Co.* v. *Balcarres Brook Steamship Co.* (3)

S. T. Evans, for the plaintiff. The defendant's contention would lead to injustice and absurdity, for by Order XVI., r. 11, no person can be added as plaintiff without his consent in writing, and the result would be, if the defendant is right, to put it in the power of any one tenant in common, however small his interest, acting in collusion with the defendant, to defeat the plaintiff's claim. The authorities shew that in such a case as the present, where the severance of the reversion took place after the date of the demise, one of the tenants in common can sue on the covenant without joining the others. The law on this point is correctly stated in Addison on Contracts, 9th ed. p. 219, as follows: "But, in covenants running with the land, and coming to parties either as tenants in common or joint tenants, the interest is joint or several, according as a joint duty arises in favour of all, or separate duties to each. If, therefore, the entire reversion is divided among several persons, each possessing a distinct interest in his particular portion, and a breach of covenant takes place affecting the value of the entire reversion, each of the parties interested has a separate right of

(1) By the Rules of the Supreme Court, 1883, Order XXI., r. 20, "No plea or defence shall be pleaded in abatement."

By Order XVI., r. 11, "The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that . . . . the names of any parties, whether plaintiffs or defendants, who ought to have been joined . . . . be added. No person shall be added as a plaintiff . . . . without his own consent in writing thereto."

By the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 4, the enactments relating to pleas in abatement are repealed, except (s. 7) so far as they are applied to local courts.

(2) 20 Q. B. D. 155.

(3) Ante, p. 422.

action; and the damages will be assessed and apportioned according to their several shares and interests in the subject-matter of the covenant." This view is supported by the authorities there referred to: *Kitchen* v. *Buckly* (1); *Martin* v. *Crompe* (2); *Simpson* v. *Clayton* (3). The plaintiff's contention is also supported by the cases of *Ackroyd* v. *Briggs* (4); *Jackson* v. *Kruger*. (5)

Gore, in reply, referred to *Foley* v. *Addenbrooke* (6); *Thompson* v. *Hakewill*. (7)

WILLS, J. The most serious question raised before us in this case is whether one of six tenants in common in reversion can bring an action without joining the other tenants in common as plaintiffs.

As to the question of tort, the point is really too plain for argument. There is now no plea in abatement, but the procedure applicable in cases of non-joinder is that specified by Order XVI., r. 11. It can never have been intended that where (as is provided by that rule) no person can be added as a plaintiff without his own consent in writing, the non-joinder of a party as plaintiff is to be fatal to the action. It is a matter of discretion, which is to be exercised by the Court or a judge as may appear to be just.

As to the other point, which raises the question of the right to sue on the covenant, I am now convinced that Mr. Evans's contention is right. The question is not whether, of several joint covenantees, one alone can sue on the covenant. On the authorities, it is quite clear that he cannot. The question here is whether, where an owner of land is entitled to the benefit of a covenant running with the land, and devises his land to six co-tenants, the case can be treated as if there were a separate covenant with each of the co-tenants, so that each of them can sue separately to enforce the covenant made with the testator. They are not seised "per mie et per tout," but each has one undivided sixth part, and the covenant becomes equivalent

(1) 1 Lev. 109.
(2) 1 Lord Raymond, 340.
(3) 4 Bing. N. C. 758, at p. 781.
(4) 14 W. R. 25.
(5) 52 L. T. (N.S.) 962.
(6) 4 Q. B. 197.
(7) 19 C. B. (N.S.) 713; 35 L. J. (C.P.) 18.

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to six separate covenants, on which separate actions can be brought. In Platt on Covenants, p. 130, the law on the point is thus stated: "Where there is no express contract with all, and their legal interest is several, the covenantees *must* sue separately; yet where the contract is entered into with the covenantees jointly, and the estate taken by them is several, they *may*, at their option, sue jointly or severally; jointly in respect of the joint contract, severally in respect of the interest." That shews that where the co-tenants have separate interests there are in effect separate covenants. There is no question of joint covenant here. I need not go through the cases that have been referred to in the argument, but I wish to point out that the two cases which were cited by Mr. Gore in reply afford no answer to the contention put forward on behalf of the plaintiff. *Foley* v. *Addenbrooke* (1) shews that where the original covenant was joint nothing will make it into separate covenants. The case decides no more than that, and there is nothing in Lord Denman's judgment to shew that where several people take in severalty the benefit of a covenant running with the land, which was made with one only, the tenants in common are not entitled to the benefit of separate covenants. *Thompson* v. *Hakewill* (2) decides really the same point. The Court there held that where two tenants in common were entitled to the benefit of a covenant contained in a joint demise originally made by tenants in common, they must both join as plaintiffs in an action of covenant. A passage in the judgment is distinctly in favour of the view we are taking: see pp. 727–8.

For the reasons which I have stated, I am of opinion that the plaintiff is entitled to succeed on both these points.

CHARLES, J. I have had some doubt; but I am also of opinion that on both these points the plaintiff is entitled to succeed.

In the first place, it is contended, as to a part of the claim, that the action is not maintainable because it is an action of tort. But it is clear that one tenant in common can bring an action of tort without joining the others. It is true that under the old practice the plaintiff could have been met by a plea in abate-

(1) 4 Q. B. 197. (2) 19 C. B. (N.S.) 713; 35 L. J. (C.P.) 18.

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ment, and it is contended that *Pilley* v. *Robinson* (1) and *Wilson, Sons, & Co.* v. *Balcarres Brook Steamship Co.* (2) shew that in such a case the judge must stay the action. That is a misconception as to the effect of those decisions. In *Pilley* v. *Robinson* (1) it was held that in an action brought against one of several joint contractors the defendant was entitled to have his co-contractors joined as defendants, the Court being of opinion that in such a case as that was the discretion could properly be exercised only in one way. In *Wilson, Sons, & Co.* v. *Balcarres Brook Steamship Co.* (2) the Court of Appeal held that generally, as to joining co-defendants, the same proposition applied. That decision, however, is not in point in the present case, where it is sought to join as co-plaintiffs five tenants in common, who cannot be joined without their own consent in writing. In such a case there is a discretion to stay the action in order that their consent may be obtained, if such a course appears advisable, or, if not, to allow the action to proceed.

As to the other point, relating to the action on the covenant, I thought at first that the action could not be maintained; but, on looking into the question, it becomes apparent that the principle of a joint covenant does not apply here. If one joint covenantee sues, and it appears on the evidence at the trial that the covenant was with several, that will be a fatal variance, which will lead to a non-suit; but that does not apply to the present case, for here the covenant was made with Humphreys, and Humphreys is now dead, and the six tenants in common, who now claim under his will, are not seised "per mie et per tout," but have separate interests and separate titles.

Judgment for the plaintiff.

Solicitors for plaintiff: *Lloyd, George, & Co.*

Solicitors for defendants: *Saffery, Huntley, & Son, for Breese, Jones, & Casson, Portmadoc.*

(1) 20 Q. B. D. 155. (2) Ante, p. 422.

P. B. H.

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April 27.

IN RE HOWELL THOMAS, FORMERLY A SOLICITOR.

Practice—Solicitor—Agreement as to Costs—Proceedings to set aside Agreement—Application at Chambers—Summons—Attorneys and Solicitors Act, 1870 (33 *& 34 Vict. c.* 28), *s.* 8—*Judicature Act*, 1873 (36 *& 37 Vict. c.* 66), *s.* 39.

An application under s. 8 of the Attorneys and Solicitors Act, 1870, made in the Queen's Bench Division, to set aside an agreement between a solicitor and his client as to costs, may be made at chambers upon a summons.

APPEAL from a decision of Kennedy, J., at chambers.

The applicant took out a summons asking that an agreement relating to costs entered into between himself and Howell Thomas, then a solicitor, should be set aside or cancelled under s. 8 of the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28); that the solicitor should be ordered to deliver a bill of the costs in respect of which the agreement was made, and that his costs should be taxed in the same manner as if no such agreement had been made.

Upon the summons coming on for hearing before the master at chambers, the preliminary objection was taken that he had no jurisdiction to entertain the application to set aside the agreement, which application could only be made in open Court. The master overruled this objection. Kennedy, J., at chambers, affirmed his decision, and Howell Thomas appealed.

Danckwerts, for the appellant. This application should have been made by motion before the Court and not at chambers. The jurisdiction to set aside an agreement between a solicitor and his client as to costs is given to the Court for the first time by the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28). Sect. 4 gives the power to make such an agreement, and s. 8 enables the agreement to be enforced or set aside "on motion or petition . . . . by the Court in which the business was done, or a judge thereof"; or, if the business was not done in any Court, then, where the amount payable under the agreement exceeds 50*l.*, by any superior Court of law or equity, or a judge thereof, and where the amount does not exceed 50*l.*, by the judge of a county court which would have jurisdiction in an action upon

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the agreement. By s. 39 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), "Any judge of the High Court of Justice may, subject to any rules of Court, exercise in Court or in chambers all or any part of the jurisdiction by this Act vested in the said High Court, in all such causes and matters, and in all such proceedings in any causes or matters, as before the passing of this Act might have been heard in Court or in chambers respectively by a single judge of any of the Courts whose jurisdiction is hereby transferred to the said High Court, or as may be directed or authorized to be so heard by any rules of Court to be hereafter made. In all such cases any judge sitting in Court shall be deemed to constitute a Court." A construction was put upon that section in *Baker* v. *Oakes*. (1) Brett, J.A., said (at p. 176), that s. 39 "does not enable a judge of the High Court to do anything that a judge could not have done before the passing of the Act." Before the passing of the Act this agreement could only have been set aside on motion or petition. Since the passing of the Act, no single judge of the Queen's Bench Division sits as a Court to hear motions. The application, therefore, can only be to the Court.

[CHARLES, J. The jurisdiction has been exercised in chambers by Lindley, J., in *In re Lewis, Ex parte Munro*. (2)]

The objection was not taken in that case.

[WILLS, J. In *Clover* v. *Adams* (3), Grove, J., says (at p. 624): "By the operation of the Judicature Act, 1873, s. 39, a judge at chambers has the jurisdiction of the High Court generally, and represents all the Courts"; and Lindley, J., in effect says the same thing.]

That is so in respect of matters in which jurisdiction is given to the Court or a judge by the Act or rules. It is conceded that where a statute in general terms and without any special limitation, either express or to be inferred from its terms, gives any power to one of the superior Courts, that power may be exercised by the judge at chambers: *Smeeton* v. *Collier*. (4) But here, by the express terms of the Attorneys and Solicitors Act, 1870, the power given is to be exercised on motion or petition. It can,

(1) 2 Q. B. D. 171.
(2) 1 Q. B. D. 724.
(3) 6 Q. B. D. 622.
(4) 1 Ex. 457.

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therefore, only be exercised in open Court. This matter is not dealt with by any of the rules and orders made under the Judicature Acts, or by these Acts.

Rolland, for the respondent, was not heard.

WILLS, J. I am of opinion that this appeal should be dismissed. As to the objection that the application to set aside the agreement should be made in open Court, it is true that the statute says that the application to enforce or set aside an agreement with respect to solicitors' costs may be made to the Court in which the business was done, and that the agreement may be enforced or set aside on motion or petition. Sect. 8 goes on to say that the jurisdiction may be exercised "by the Court or a judge thereof." It is therefore clear that the Act meant that it might be exercised by a single judge. It is said that after the passing of the Judicature Acts the jurisdiction given to a single judge is gone, because there is no such thing in the Common Law Courts as a single judge sitting in Court to hear motions. But I am of opinion that the general jurisdiction of a single judge to act for the Court was preserved by s. 39 of the Judicature Act, 1873. I am clearly of opinion that the decision of the judge at chambers was right, and the universal practice of making these applications at chambers, which has prevailed ever since the Judicature Acts were passed, is not wrong. This appeal must be dismissed.

CHARLES, J. I am of the same opinion.

Appeal dismissed.

Solicitors for appellant: *Wontner & Sons.*

Solicitor for respondent: *F. Rolt.*

W. A.

CARTER, APPELLANT *v.* THOMAS, RESPONDENT. 1893 *April* 12, 13.

Local Government — Local Authority — Powers — Fire Brigade — Control of Premises where Fire takes place—Right to Exclude the Public—Town Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *s.* 32—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 171.

By s. 171 of the Public Health Act, 1875, incorporating s. 32 of the Town Police Clauses Act, 1847, an urban authority "may employ a proper number of persons to act as firemen, and may make such rules for their regulation as they think proper."

The respondent, a member of a fire brigade provided by an urban authority, was instructed by his foreman to exclude all persons from certain premises, where the brigade was engaged in extinguishing a fire. He refused admission to the appellant, a member of a volunteer fire brigade, who thereupon endeavoured to force an entrance, and in so doing assaulted the respondent:—

Held, that the effect of the statutes was to give to the brigade provided by the urban authority control over the premises, that the appellant was lawfully excluded, and could not justify his attempt to force an entrance, and therefore was rightly convicted of an assault.

CASE stated by justices.

The appellant was convicted of an assault upon the respondent.

Upon the hearing of the information it was admitted and found as a fact that the respondent was a member, and in the uniform, of the fire brigade provided by the Heston and Isleworth Local Board under the provisions of the Public Health Act, 1875 (1), incorporating the provisions of the Town Police Clauses Act, 1847 (2), and that the appellant was in the uniform of, and was a member of, a fire brigade called the Hounslow Original Fire Brigade, formed in the district, and supported by voluntary subscriptions and payments, and donations from various insurance companies.

(1) 38 & 39 Vict. c. 55: "Police Regulations.

Sect. 171. The provisions of the Town Police Clauses Act, 1847, with respect to the following matters (namely); . . . With respect to fires . . shall, for the purpose of regulating such matters in urban districts, be incorporated with this Act."

(2) 10 & 11 Vict. c. 89, s. 32, provides that the commissioners may provide fire engines, &c., "and may employ a proper number of persons to act as firemen, and may make such rules for their regulation as they think proper."

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It was also admitted and found as a fact that the respondent, when the alleged assault was committed, was at a fire, which occurred in a house in the Inwood Road, Hounslow, in pursuance of his duty as a member of the Local Board Fire Brigade, and that Frank Marcham, the foreman, was also present in charge of such brigade, and that the respondent received instructions from his foreman not to allow anyone to pass in at the gate of the house where the fire occurred.

It was also admitted that the foreman of the Hounslow Original Fire Brigade, to which the appellant belonged, was in the house at the time the appellant presented himself for admission, that the appellant was at the time in uniform, and when he arrived at the gate he asked the respondent to allow him to pass; that the respondent thereupon told him the orders he had received from his foreman, and refused to allow him to do so; whereupon the appellant stated the respondent should not stop him, and pushed the gate, and struggled with the respondent to get in, and tried to throw him over. This was the assault that was complained of. It was admitted that no more force was used by the appellant than was necessary to enable him to pass the respondent and enter the premises.

It was contended on behalf of the appellant that he had a right, as against the respondent, to go into the house, and that the justices had no jurisdiction to try what it was contended was a bonâ fide question of right.

It was further contended on behalf of the appellant that the respondent had no legal right to prevent him entering the house, and that he was justified in pushing him and using sufficient force to enter the premises.

The justices, being of opinion that the respondent, acting under the orders of his foreman, who at the time was the officer in charge of the brigade of the properly constituted local authority—namely, the Heston and Isleworth Local Board, who by statute were authorized to provide and keep engines and firemen, and which brigade the justices considered was the proper one to take charge of any fire that should occur in its district—had full authority to prevent any person from entering the premises in question without the sanction of the officer in

charge of the brigade at the time, which in this case was foreman Marcham, convicted the appellant.

The questions for the opinion of the Court were—

(1.) Whether the justices had jurisdiction to try the case, the appellant having set up an alleged bonâ fide claim of right.

(2.) Whether any member of the fire brigade provided by the local board had any authority, by statute or otherwise, to prevent a member of any other fire brigade from entering premises at which there was a fire for the purpose of assisting in extinguishing the same.

Lyttelton, for the appellant. In the first place, the justices had no jurisdiction. In the absence of any finding to the contrary, it must be assumed that the appellant acted bonâ fide, in the sense that his object in seeking to obtain entrance to the premises was to assist in extinguishing the fire. If so, there was no mens rea, but he was asserting a bonâ fide claim of right, and ought not to have been convicted: *White* v. *Feast* (1); *Watkins* v. *Major*. (2)

Secondly, the respondent had no authority to prevent the appellant from entering the premises, and therefore the appellant, who is found not to have used unnecessary violence, was justified in forcing his way in. At common law there is a general right to assist in extinguishing fires: *Maleverer* v. *Spinke* (3), where it is stated that "a man may justify pulling down an house on fire for the safety of the neighbouring houses." The statutes referred to in the case have not the effect which the justices supposed them to have. If it had been intended to confer on fire brigades provided by urban authorities control over premises where fires take place, and power to exclude other persons, this would have been done by express enactment, as is done in the case of the metropolis by the Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), s. 12. The omission of a similar clause from the Public Health Act, 1875, shews that the legislature purposely abstained from conferring on the brigades provided by urban authorities the powers conferred

(1) Law Rep. 7 Q. B. 353. (2) Law Rep. 10 C. P. 662.
(3) Dyer 35 a, 36 b.

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on the metropolitan brigade. Both parties were in the same position, being both licensees, and one could have no right to exclude the other.

Craies, for the respondent. Sect. 171 of the Public Health Act, 1875, confers on the urban authority the powers conferred on the commissioners by s. 32 of the Town Police Clauses Act, 1847; therefore the urban authority "may employ a proper number of persons to act as firemen, and may make such rules for their regulation as they think proper." These words confer on the urban authority the power of deciding who are to act as firemen, and excluding other persons. The use of the words "Police Regulations" in the heading to s. 171 shews an intention to confer the right of regulating proceedings at fires. Sect. 66 imposes on the urban authority the duty of providing fire-plugs and other necessary works for insuring an efficient supply of water in case of fire, and it must have been intended to confer the powers reasonably necessary for carrying out such duty: *In re Corporation of Dudley.* (1) The case shews that the fire brigade provided by the local board was in charge of the premises, and there is no evidence of any licence to the appellant to enter, and therefore he had no greater right than any other member of the public. Even if it were correct to describe both parties as licensees, there would be no justification for the assault.

[On the question as to jurisdiction, he was stopped by the Court.]

POLLOCK, B. This case raises a question of some importance; but when all the facts are looked at, I think we can come to a reasonable conclusion without disturbing any principle of law.

The facts are as follows. A house was on fire, and the fire brigade provided by the local board came to put out the fire. The respondent, a member of that brigade, acting under the instructions of his foreman, refused to allow the appellant, who was a member of a volunteer fire brigade, to enter the premises. The appellant attempted to force his way in, and, in so doing, committed the assault for which he was convicted. The question

(1) 8 Q. B. D. 86.

which arises in the first instance is, under what circumstances did the local board fire brigade come to put out the fire, and what was their position while so employed? That question depends partly on the effect of the different Acts of Parliament, and partly on the inferences to be drawn from the circumstances of the case. The local board fire brigade is established under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171 of which incorporates s. 32 of the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), the effect of which is that the local board are empowered to provide engines and other necessary appurtenances for extinguishing fires and for purposes of safety, "and may employ a proper number of persons to act as firemen, and may make such rules for their regulation as they think proper." In the present case no rules appear to have been made. The question, therefore, turns on the meaning of the expression "may employ a proper number of persons to act as firemen." I think the meaning of these words is not confined to acts directly necessary for the purpose of extinguishing a fire, such as pumping water, but may reasonably include the doing of such acts as may be necessary to prevent the inconvenience which would arise from overcrowding or interference with the work. There is no direct evidence before us as to the conduct of the owner of the house; but I think it sufficiently appears from the case that the magistrates must have inferred that he allowed the local board fire brigade to come on to the premises. The foreman of the local board fire brigade gave orders not to allow other persons to come on the premises, and the respondent was instructed to carry out this order. The appellant presented himself and demanded admission. He was a member of a volunteer fire brigade, and was in uniform, and we may take it that he acted bonâ fide, that is, that he came there for the purpose of assisting to extinguish the fire. He was told that he could not come in, and in attempting to force his way in he assaulted the respondent. The next question is, what right or what duty had the appellant to justify him in acting as he did? It is not, as has been argued, a question of mens rea, for in order to justify his conduct he must shew that he was being prevented from doing that which he had a legal right to do, and further, that he used

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no more violence than was necessary in order to enable him to carry out his legal purpose. There is no finding as to the consent or otherwise of the owner of the premises with regard to the appellant's presence; but it is contended that, because the foreman of the volunteer fire brigade to which the appellant belonged was on the premises, therefore the appellant had as much right there as any member of the local board fire brigade. I think, however, that the power under the statutes of the local board fire brigade would include the preservation of order, and exclusion of persons whom it might be necessary to exclude, and the appellant was trying to enter on premises where he had no right to enter, and his justification fails. Even assuming that, while the respondent was there by permission of the owner, the appellant was not prohibited by the owner from entering the premises, I should say the same consequence would follow. I am of opinion that the first reason which I have given for my decision, which depends on the effect of the statutes, is in accordance with law and convenience, and therefore the magistrates have come to a reasonable conclusion. This being so, the question suggested as to the general right of the public to take measures for the purpose of extinguishing fires does not arise, and it is unnecessary to discuss it.

KENNEDY, J. I consider the point as to jurisdiction not to be really arguable; but as to the other point, I will add a very few words. The appellant assaulted the respondent, who was engaged by the public authority for the express purpose of extinguishing a fire. The appellant had no public position, and had no direct authority to enter on the premises. It is true that he was in uniform; and I will assume that he was acting bonâ fide; but this can give him no greater right to enter the premises than any member of the public would have. The contention on behalf of the appellant would lead to this conclusion, that any one in Hounslow might have gone on to the premises, and done what he thought expedient for the purpose of extinguishing the fire. We must assume that the firemen of the local board were on the premises with the consent of the owner, and, if so, what right had the appellant to force an entrance? I can conceive circumstances

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under which such an act might be justifiable; as, for instance, if it were necessary in order to save life, or perhaps also if there were an insufficient force on the premises for the purpose of extinguishing the fire, or if the duty of the persons employed in doing so were being neglected, and danger to life or property were the result. Here there is no such suggestion, and therefore there is no justification for what the appellant did. He can shew no title except his good intention. If it were necessary, I should be prepared to hold that the respondent was discharging a duty involving the exclusion of unauthorized persons from the premises; but it is unnecessary to rest my decision on this; because, for the reasons I have given, I am of opinion that the magistrates have come to a right conclusion.

Conviction affirmed.

Solicitors for appellant: *Charles Robinson & Co.*
Solicitor for respondent: *Hugh R. Peake.*

P. B. H.

IN RE AN ARBITRATION BETWEEN BATER AND THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF BIRKENHEAD.

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April 19.

Local Government—Offences—Unwholesome Meat—Refusal of Justice to Condemn—Costs incurred by Owner of Meat in resisting Condemnation—"Full Compensation"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117, 308.

Although the owner of meat which has been seized by an inspector and brought before a justice for condemnation under ss. 116 and 117 of the Public Health Act, 1875, is not entitled as of right to attend and give evidence in defence of the meat, the justice may, if he thinks fit, hear evidence tendered by such owner in that behalf, and if, after so doing, the justice should refuse to condemn the meat, the full compensation which the owner may be awarded under s. 308 will include the costs which he has reasonably incurred in resisting the condemnation of the meat.

Meat belonging to the appellant was seized by one of the respondents' inspectors under s. 116 of the Public Health Act, 1875, and carried before a justice. The appellant attended and brought evidence to shew that the meat was sound. The justice, after hearing this evidence, refused to condemn the meat. The appellant, however, declined to receive it back. Proceedings having been taken under s. 308 to ascertain by arbitration the amount of compensation due to the appellant, the arbitrators stated a case for the opinion of the Court:—

Held, that the appellant was not entitled to refuse to take back the meat,

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and could only recover the damage sustained by it in consequence of the seizure; but that he was entitled to be repaid the costs reasonably incurred by him in attending before the justice and resisting the condemnation of the meat.

SPECIAL case stated by arbitrators under s. 7 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49).

It appeared that the appellant, Thomas Bater, was a meat salesman and cattle importer carrying on business at Birkenhead. On August 23, 1892, an inspector of nuisances for the respondents, who were the local authority for the borough of Birkenhead, under the Public Health Act, 1875, seized, under s. 116 of that Act, the carcase of a bullock belonging to the appellant as unfit for human food, and on August 24 the carcase was taken before one of the justices of the peace for the borough. The appellant attended before the justice and brought evidence to shew that the meat was not unfit for human food. The justice, having heard this evidence, refused to condemn the meat or to make any order in respect of it. The inspector thereupon tendered the carcase back to the appellant, who, however, refused to receive it. Proceedings were then taken for the assessment by arbitration of the compensation due under s. 308 for the damage sustained by the appellant. (1)

The arbitrators found that if the appellant was legally entitled to refuse to take back the carcase, the amount of compensation to which he would be entitled in respect of the carcase would be 11*l.*; but if he were not legally entitled to refuse to receive it back, then the amount of compensation to be paid by the respondents in that respect would be 4*l.* 2*s.* 6*d.*; and they further found that if the costs of appearing before the justice and opposing the application for the condemnation of the meat could lawfully be included in the word "compensation" as used in s. 308, then the amount of compensation to be paid by the re-

(1) By s. 308 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), "Where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers, and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act."

spondents to the appellant in this respect would be 29*l.* 18*s.* 6*d.*; and they stated a case for the opinion of the Court on these two questions.

Poland, Q.C., and *Macmorran*, for the appellant. The question of the liability of the local authority is not now before the Court. The only question is as to the meaning of "full compensation" in s. 308 of the Public Health Act, 1875. The carcase having been seized and examined would be valueless to the appellant, and he was therefore entitled to refuse to take it back.

[WILLS, J. We are both of opinion that he ought not to have refused to take back the carcase.]

As to the costs, although the appellant could not claim as a right to attend before the justice and oppose the condemnation of the meat, it was reasonable that he should do so, and he ought therefore to be repaid the costs which he has incurred. If the justice had condemned the meat, he might then and there, if the appellant had been willing, have proceeded to inquire into a charge against him for having such meat in his possession under s. 117: *Reg.* v. *Hughes.* (1) The justice would then have had jurisdiction over the costs.

Joseph Walton, Q.C., and *W. F. K. Taylor*, for the respondents. The appellant had no right to appear before the justice to resist the condemnation of the meat: *White* v. *Redfern.* (2) He was, therefore, only a volunteer, and costs incurred by him were not incurred as the natural consequences of the seizure of the meat: *Waye* v. *Thompson* (3); *Vinter* v. *Hind.* (4) To hold that in every case where the justice declines to condemn the meat the local authority becomes liable to the owner of the meat for the costs incurred by him in resisting its condemnation will be to impose a very serious burden on local authorities.

Poland, Q.C., replied.

WILLS, J. This case is not free from difficulty, for, as often happens, judicial interpretation has to supply the place of the direct words of the statute. As was pointed out by Field, J., in *Vinter* v. *Hind* (4), s. 117 of the Public Health Act, 1875, is

(1) 4 Q. B. D. 614.
(2) 5 Q. B. D. 15.
(3) 15 Q. B. D. 342.
(4) 10 Q. B. D. 63.

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inartificially drawn, and every judge who has had to construe it has found it full of difficulty.

The question that we have to decide is whether, under proceedings for condemning meat, the person whose meat has been seized—as it turns out, wrongfully—is entitled under s. 308 of the Public Health Act, 1875, to compensation on the scale of the total value of the meat, and also to costs incurred by him in appearing before the magistrate, before whom the meat was brought, to defend the meat. On the first point I agree with the view taken by the corporation. It is impossible, I think, to contend that, because the meat had been seized and was not condemned by the magistrate, the owner of the meat was entitled to refuse to take it back. The meat was still his, and he could not refuse to receive it, and, therefore, he, like every one else who seeks to recover damages, must act in a reasonable manner and must do what he can to prevent the damage which he has incurred from being increased. As constantly happens in such cases, each party was afraid of touching the meat for fear of derogating from their strict rights, and the consequence was that valuable property was lost. The arbitrators have found that in this respect the amount of compensation due to the owner is 4*l.* 2*s.* 6*d.*, if the owner was not legally entitled to refuse to accept back the meat. We hold that he was not entitled to do so, and, therefore, as to this part of the case, the amount to which he is entitled is 4*l.* 2*s.* 6*d.*

Then comes a much more serious question, namely, whether he is entitled to be repaid the costs incurred by him in appearing before the magistrate and bringing evidence to shew that the meat was not unfit for human food. The procedure by which the condemnation of meat takes place is no doubt to some extent anomalous, since it may take place behind the back of the owner, or, if he is present, without his being heard at all. In *Waye* v. *Thompson* (1), I am reported to have said, "It has been already clearly decided that the defendant cannot be heard on the application to condemn the meat." I think that that statement is wrong. It is clear that the owner of the meat is not so entitled as of right to be heard on the application for

(1) 15 Q. B. D. 342.

the condemnation of the meat, as to make the condemnation invalid if it takes place without his having the opportunity of being heard; so much is decided in *White* v. *Redfern* (1); but it is nowhere laid down that it is impossible for him to be heard. If the magistrate chooses arbitrarily to refuse to hear him, he is entitled to do so; but he may, if he likes, hear what he has to say. It is contended by Mr. Walton that the owner on the application for the condemnation of the meat, if heard at all, is a mere volunteer; but I do not think it at all follows that because he cannot claim to be heard as a matter of right, his endeavour to be heard and his being heard are not natural consequences of the act of seizure. A man who felt that he was in the right and that his meat, which had been seized, ought not to be condemned, would be almost certain to take the course of going before the magistrate and applying to him to hear what he had to say in defence of the meat.

The words of s. 308 are that he is to have "full compensation," and I think that both common sense and justice require that the steps which any ordinary and right-minded man who was conscious of the rectitude of his own case would be likely to take ought to be paid for if he turns out to be right. I admit that I was at first impressed by Mr. Walton's argument that to saddle the corporation with the liability to pay costs in case of a mistake by an inspector would be alarming, when so many carcases have to be inspected every day; but that is, I think, only the liability which every public body must undergo when their officer has to decide whether or not he will take proceedings. The erroneous taking of such proceedings almost always involves the liability to pay costs. Besides, I think that the result of deciding this question the other way would be to inflict such hardships on the owners of meat that legislation on the subject would not remain as it is. It would only be consonant with the current of modern legislation to give the magistrate who has the power of condemning the meat power to deal with the costs incurred by the owner in resisting such condemnation. The argument, therefore, when it comes to be examined, has not great weight. In the case of nuisances,

(1) 5 Q. B. D. 15.

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much larger costs are often incurred by the persons who oppose the course taken by the inspector, and yet the local authority has to undergo the liability of paying those costs if the inspector prove to have been in error. I think, therefore, that we ought not to be deterred from giving to s. 308 its natural and reasonable interpretation, and I hold that the words "full compensation" include the costs incurred by the owner of the meat in attending before the magistrate with his witnesses on the occasion of the application for the condemnation of the meat.

CHARLES, J. I am of the same opinion. For the purpose of deciding this case we have to assume that the appellant has sustained damage for which the corporation of Birkenhead are liable to compensate him. The question is as to the amount of that compensation. Sect. 308 of the Public Health Act, 1875, says it is to be "full compensation," and it is contended for the appellant that he is entitled (1.) to the full price of the carcase seized, and (2.) to the costs of his attendance before the magistrate who had to decide whether or not it should be condemned. As to the first point, I need add nothing to what has been said by my brother Wills. I am clearly of opinion that the appellant is only entitled to the lesser sum of 4*l.* 2*s.* 6*d.*, and not to the whole value of the carcase. He had no right to insist on throwing the whole amount upon the corporation.

The second and the much more important question is whether he is entitled to the costs of his attendance before the magistrate. It is said that that attendance was not the ordinary and natural consequence of the act of the inspector in seizing the meat. I am unable to agree in that contention. A man who knew, as the appellant did, that the magistrate would be invited to destroy as unfit for the food of man meat which he believed, and could prove to be not unwholesome or unfit for human food, would naturally attend before the magistrate, although he was neither summoned nor bound to do so, in order to resist the destruction of the meat. It was perfectly natural and right for the appellant, in my opinion, to go before the magistrate with his witnesses. But then it is said that the magistrate had no power to hear him or his witnesses. No case decides that. No doubt

Field, J., in *White* v. *Redfern* (1), and in *Vinter* v. *Hind* (2), says that the magistrate need not hear the owner if he likes to refuse to do so; but no case goes so far as to say that the magistrate has no power to listen to the owner of the meat. Although he is not entitled to be heard, the magistrate may hear him if he thinks fit, and on his attendance before the magistrate, if a charge were formulated against him under s. 117 of the Public Health Act, with a view to his committal to prison, the magistrate would have power, I think, to hear and determine that charge then and there, and would have jurisdiction over the costs of the witnesses under s. 18 of 11 & 12 Vict. c. 43. That, however, was not done here. The magistrate was only asked to condemn the carcase, and he very properly heard the evidence tendered by the owner of the carcase, although he was not bound to do so, and in the result he declined to make the order condemning the meat. It was the natural consequence of the mistake made by the inspector, that the owner of the meat should attend before the magistrate in defence of the meat; and I think that the costs incurred by him ought to be included in the "full compensation" which he may be awarded under s. 308. We therefore answer the first question propounded to us by the arbitrators in the negative, and the second in the affirmative.

Solicitors for appellant: *Hamlin, Grammer, & Hamlin, for R. B. Moore & Son, Birkenhead.*

Solicitor for respondents: *Alfred Gill.*

(1) 5 Q. B. D. 15. (2) 10 Q. B. D. 63.

A. P. P. K.

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Feb. 8, 10.

PHARMACEUTICAL SOCIETY *v.* PIPER & CO.

Pharmacy Acts—Sale of Poisons—Medicine containing a Scheduled Poison—Patent Medicine—Pharmacy Act, 1868 (31 & 32 *Vict. c.* 121), *ss.* 1, 15, 16, 17.

By s. 15 of the Pharmacy Act, 1868, any person who sells or keeps an open shop for the retailing, dispensing, or compounding poisons, not being a duly registered pharmaceutical chemist or chemist and druggist, is made liable to a penalty of 5*l.*; by s. 2 the articles described in Schedule A are to be deemed poisons within the meaning of the Act, the schedule including (inter alia) opium and all preparations of opium; by s. 16 nothing in the Act is to interfere with the dealing in patent medicines.

The defendants, a firm of grocers, sold a bottle of a proprietary medicine, called chlorodyne, in the ordinary course of their business. Chlorodyne was not protected by letters patent, but was admitted to be a useful medicine. Evidence was given that the bottle contained one grain of morphine, the active principle of opium, and that eight-tenths of a grain had been known to prove fatal to an adult:—

Held, that the prohibition in the Act against the sale of poisons by other than registered chemists was not confined to the sale of the scheduled poisons in their simple state or of the preparations of such poisons, but extended to the sale of a compound containing a scheduled poison as one of its ingredients, and that chlorodyne was a poison within the meaning of the Act:—

Held, further, that the exception in s. 16 in favour of patent medicines extended only to medicines which were the subject of letters patent and not to proprietary medicines.

Appeal from a decision of the judge of the Bloomsbury County Court.

The particulars of demand annexed to the summons stated that the action was brought to recover a penalty of 5*l.* "incurred by the defendants in keeping open shop for retailing, dispensing, or compounding an article called chlorodyne, which contained poisons, to wit, opium or a preparation of opium, and chloroform, or one of the said poisons, contrary to the provisions of the Pharmacy Act, 1868 (31 & 32 Vict. c. 121)." (1)

(1) By s. 1 of the Pharmacy Act, 1868, it is made unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons, unless he is a pharmaceutical chemist, or a chemist and druggist within the meaning of the Act, and is registered under the Act. Poisons are defined in s. 2 as the several articles named in Schedule A, part 2 of which includes chloroform and opium and all preparations of opium. Sect. 15 imposes a penalty of 5*l.* on each offence, recoverable in the manner

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The defendants were a firm of grocers, and in the ordinary course of their business had sold a half-ounce bottle of chlorodyne, a proprietary medicine sold under a Government stamp. At the trial evidence was given to shew that a bottle of chlorodyne of that size contained one grain of morphine, the active principle of opium; that the hundredth part of a grain might kill an infant; and that eight-tenths of a grain had been known to kill a man. The dose to be taken by an adult, in accordance with the directions on the bottle, would contain only from one-fortieth to three-fortieths of a grain. Chlorodyne was admitted to be a useful medicine, which had been largely sold for forty years. It was not, and never had been, protected by letters patent; but the defendants called evidence to shew that from a date prior to the passing of the Act (1868) down to the present time the term "patent medicine" had been universally considered in the trade to include proprietary medicines, of which there were several thousands in existence. The learned county court judge

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provided by the Pharmacy Act, 1852.

By s. 16: "Nothing hereinbefore contained shall extend to or interfere with the business of any legally qualified apothecary . . . , nor with the making or dealing in patent medicines, nor with the business of wholesale dealers in supplying poisons in the ordinary course of wholesale dealing."

By s. 17: "It shall be unlawful to sell any poison, either by wholesale or by retail, unless the box, bottle, vessel, wrapper, or cover in which such poison is contained be distinctly labelled with the name of the article and the word poison, and with the name and address of the seller of the poison; and it shall be unlawful to sell any poison of those which are in the first part of Schedule A to this Act . . . to any person unknown to the seller, unless introduced by some person known to the seller; and on every sale of any such article the seller shall, before delivery, make or cause to be made an entry in a book to be kept for that purpose, stating, in the form set forth in Schedule F to this Act, the date of the sale, the name and address of the purchaser, the name and quantity of the article sold, and the purpose for which it is stated by the purchaser to be required, to which entry the signature of the purchaser, and of the person, if any, who introduced him shall be affixed." The section then imposes a penalty for sales contrary to its provisions, and enacts that none of its provisions shall apply "to any medicine supplied by a legally qualified apothecary to his patient, nor apply to any article when forming part of the ingredients of any medicine dispensed by a person registered under this Act; provided such medicine be labelled in the manner aforesaid with the name and address of the seller, and the ingredients thereof be entered, with the name of the person to whom it is sold or delivered, in a book to be kept by the seller for that purpose."

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was of opinion that chlorodyne was a poison within the meaning of the Act, and that it did not come within the exception in favour of patent medicines, and gave judgment for the plaintiffs. The defendants appealed. (1)

Bonsey, for the defendants. The decision of the county court judge was wrong. Firstly, chlorodyne is not a poison within the meaning of the Pharmacy Act, 1868. It is obviously not one of the scheduled poisons, nor is it a "preparation" of one of them, for a "preparation" does not mean a mere compound or mixture containing a small quantity of poison, but rather something made from the poison in the same form and retaining the same properties. Chlorodyne is a useful medicine containing as one of its ingredients a small quantity of one of the scheduled poisons, and is not within the purview of the Act. The Act only applies to the sale of poisons pure and simple, and their preparations, or to poisons mixed or disguised in such a way as to evade the Act; if it had been intended to include more, it would have been easy to say "any poison, or any compound, one of the ingredients of which is a scheduled poison." If the Act has a wider application, the only reasonable way of interpreting it is to hold that the compound must be substantially a poison such as one of the scheduled poisons. The operation of the Act is not confined to medicines, and to make the presence of an infinitesimally small quantity of poison the test of its applicability would bring within its scope many articles such as soaps and cosmetics, which could then only be sold by a chemist. Chlorodyne is not within the ordinary popular meaning of the word "poison"; that is, a thing which, if taken in small quantities, is dangerous to life.

Secondly, chlorodyne is within the exception contained in s. 16 in favour of patent medicines. In that section patent and proprietary medicines are all placed in one category of patent medicines as a compendious way of describing them, thus

(1) It was stated in the course of the argument that proceedings under s. 17 had recently been taken against the proprietor or manufacturer of chlorodyne before a metropolitan police magistrate for not placing a label with the word "poison" on each bottle, which had resulted in the infliction of a penalty, and that there had been no appeal from the conviction.

avoiding the distinction which is drawn between them in the schedule to the Stamp Medicines Act, 1812 (52 Geo. 3, c. 150), which formed the ground of the decision in the Court below. The evidence given on behalf of the defendants, that before and from 1868 the term "patent medicine" was understood to include proprietary medicines and that no distinction was drawn between them in the trade, was uncontradicted, and is cogent evidence to shew the sense in which the term was used by the legislature.

Poland, Q.C. (*T. R. Grey*, with him), for the plaintiffs. The prohibition contained in s. 1 of the Act against the sale of poisons by other than properly qualified persons selling in accordance with the provisions of the Act is not confined to the sale of the poisons named in the schedule in the state of poisons pure and simple, and to preparations of such poisons. It embraces equally a mixture which contains an appreciable quantity of a scheduled poison, so as to be poisonous if improperly taken. A mixture is none the less a poison within the meaning of the Act because it is intended to be used as a medicine. The provisions of s. 17 shew that the Act has a wider operation than is indicated by the schedule, and that a poison is not the less a poison because it is combined with other ingredients, and is used for curative purposes.

Chlorodyne is not a patent medicine within the meaning of s. 16. Patent medicines are only one of several classes of medicines liable to stamp duty. Looking at 52 Geo. 3, c. 150, there is an obvious distinction drawn in the schedule between medicines made under the protection of letters patent under the great seal and the class of nostrums, specifics, and proprietary medicines, and the term "patent medicine" in the Act of 1868 must have the same meaning as it has in the former Act; which is, besides, the meaning which would be attributed to it in ordinary language. If the legislature had desired to exempt proprietary medicines, it would have done so in terms, as it has done in s. 6 of the Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), in sub-s. 2 of which there is an exception in favour of proprietary medicines from the operation of the provisions as to selling to the prejudice of the purchaser.

Bonsey, in reply. If the contention of the plaintiffs is right

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that because a proprietary article contains poison as one of its ingredients it is a poison within the meaning of the Act, the sale of all such proprietary articles would be stopped; they could not be sold by any one who was not a chemist, nor could a chemist sell them, for he would not know the quantity of poison they contained, and could therefore not comply with the requirements of s. 17 as to entering the quantity in his books.

[COLLINS, J. That depends on the meaning of "article" in s. 17.]

The word must be taken to mean "poison" in both branches of the section.

LAWRANCE, J. I have during the argument felt considerable doubt, which I cannot say has been altogether removed, but, after giving the best consideration I can to the question whether a person who is not a chemist can sell a proprietary medicine containing poison, I have come, not altogether willingly, to the conclusion that he cannot. By the preamble of the statute, it is declared to be expedient for the safety of the public that persons keeping open shop for the retailing, dispensing, or compounding of poisons should have a competent practical knowledge of their business, and should be examined and registered, and by s. 1 it is made unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons unless he is a pharmaceutical chemist or chemist and druggist within the meaning of the Act, and is registered under the Act. The question for us is whether the appellants were such persons—that is, persons who not being chemists were retailing a poison. Our attention has been called to several sections, the first important one being s. 15, under which the defendants were convicted; that section provides (inter alia) that any person who sells or keeps an open shop for the retailing, dispensing, or compounding poisons, not being a duly registered pharmaceutical chemist or chemist and druggist, shall be liable to a penalty of five pounds for every offence. The penalty inflicted by that section is the penalty to which the county court judge has found the defendants to be liable. The only exception to the prohibition of a person retailing poison

is contained in s. 16, which provides that nothing in the preceding sections of the Act is to extend to or interfere with the business of a legally qualified apothecary, &c., nor with the making of or dealing in patent medicines, nor with the business of wholesale dealers in supplying poisons in the ordinary course of wholesale dealings. Now, it is argued that whatever this article chlorodyne may be, whether it is a poison or not, it is at any rate a patent medicine, and, therefore, the requirements of the Act have no reference to it. I will deal with that point first.

We have been referred to 52 Geo. 3, c. 150, which relates to the liability of patent and other medicines to stamp duty; the schedule enumerates a number of medicines, and then goes on to embrace in very wide language (I put it shortly) all other pills, powders, lozenges, &c., and all preparations to be used as medicines. It deals with three classes of persons whose medicines may come under the schedule, those who claim an exclusive right to make or prepare secret medicines, those who have a title under letters patent, and those who own what are called nostrums or proprietary medicines, all of whom are mentioned as entirely distinct classes. It has been contended for the appellants that the term "patent medicines" includes all the medicines dealt with in the schedule, and at first I was impressed with this view of the case; but, seeing that the distinction is clearly taken in that statute between proprietary medicines and medicines protected by letters patent, I have come to the conclusion on this branch of the case that the expression "patent medicine" in s. 16 means a medicine protected by letters patent under the great seal, and, therefore, that the rights reserved under s. 16 do not apply in the case of chlorodyne.

On the other branch of the case, as to what is meant by "poison," our attention has been called to s. 17, as to the regulations to be observed by persons properly qualified to sell poisons; and although in one sense that section does not bear on the present case, it is useful as an illustration, and as shewing what the legislature meant when it used the word "poison." [The learned judge read the section.] The defendants contend that the expression "article" means poison alone, a

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poison pure and simple, and asks us to say that the word has no application to a compound or medicine of which a poison is merely an ingredient. I was for some time impressed by that argument; but upon the whole I am of opinion that the Act is not to be construed in that restricted sense, and to be held to apply only to the sale of poisons pure and simple, though I do not feel sure that that was not the intention of the legislature. This view is strengthened by the language of the latter part of s. 17, which says that its provisions are not to apply to any article—that is, any article being a poison—when forming part of the ingredients of a medicine dispensed by a person registered under the Act; that is to say, when there is the protection afforded to the public by the fact that the medicine is dispensed by a properly qualified person, the poison label and certain other formalities may be dispensed with. The conclusion which I should draw from the earlier part of the section is that if a medicine contains a poison it must be labelled as a poison, and the requirements of the section must be carried out by the seller making the necessary entry under Schedule F as to the name and quality of the poison sold, &c. It is contended that this could not be done in the case of a proprietary medicine if the seller did not know the amount of poison it contained; but that seems to be the very mischief at which the Act might be supposed to aim, and I should imagine one of the objects of the plaintiffs to be to find out what proprietary medicines contain poisons and the quantity they contain. The observation, at any rate, does not apply to the case of chlorodyne, because it is known to contain poison, and the quantity of the poison is also known. The Act would, in my opinion, be sufficiently complied with if the seller entered under the head of name and quantity of poison the number of bottles of chlorodyne sold.

Of course, every case can be so put as to appear ridiculous, and the case has been put to us of a medicine containing an infinitesimal quantity of poison; but it is obvious that, at any rate, no harm would be done by labelling such a medicine "poison." There is a point at which any medicine containing poison may become dangerous, and we ought not to fritter away the provisions of an Act of Parliament the object of which is to protect

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the public and to prevent unqualified persons, who may have no scientific or chemical knowledge whatever, from retailing, dispensing, or compounding poisons. There is a very probable and sufficient reason for the exception in favour of patent medicines, for any one can by inquiry find out of what they are compounded, while the ingredients of a proprietary medicine can only be ascertained by analysis. That accounts for the proceedings taken by the plaintiffs to get this article, chlorodyne, labelled as a poison. The decision of the learned magistrate is not binding on us in this case; but I certainly think that if chlorodyne contains a poison it is right that it should be labelled "poison," and then, as it contains a poison, the seller, if not a properly qualified person under the Act, would be liable to the penalties imposed by s. 15. I think, therefore, that the decision of the learned county court judge was right and should be affirmed.

COLLINS, J. I am of the same opinion. It is unnecessary for me to go through the sections of the Acts of Parliament, which have been dealt with very fully by my learned brother. There are two points for our consideration: first, was the thing sold a poison within the meaning of the Act? and, secondly, if so, does it come within the exception in favour of patent medicines in s. 16? An exceedingly able argument has been addressed to us on behalf of the defendants, and the question is of considerable difficulty, nor do I feel perfectly sure that the conclusion at which I have arrived is the correct one. In this particular case, I think that the article in question, chlorodyne, is a poison within the meaning of the Act; it contains among its ingredients more than one poison, namely, opium, or a preparation of opium, and chloroform, both of which are included in the second part of the schedule; and it was sold in a bottle containing sufficient morphine (which is the active principle of opium) to kill an adult if the whole contents were taken at once. In the particular case, therefore, I take it that the thing sold was, in its entirety, a poisonous thing: that is, that a small quantity might kill the person taking it. I am also of opinion, for reasons that I shall give later on, that it is a compound into which a scheduled poison enters as an ingredient, and that it complies for that reason with

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the designation of a poison as dealt with by the Act. But though I am of this opinion with regard to this particular article, chlorodyne, I do not think it necessary to lay down a rule which would cover every case where a compound contains an infinitesimally small quantity of poison; that question can be dealt with when it arises. Here there is a small quantity sold which is capable of poisoning an adult: is it a poison within the meaning of the Act? I think it is.

The Act in s. 1 makes the sale of poisons unlawful except by certain persons, and it contains a schedule in two parts which include different poisons, as to which different provisions are made; chloroform is put absolutely in the second part of the schedule, without any mention of preparations of it; but opium is included with all its preparations; and it was forcibly argued that the schedule can only include the actual poisons named in it, and that the Act does not apply to something into which one of those poisons enters, but which is itself incapable of being described either as a poison or as a preparation of a poison. I do not think that chlorodyne can be properly described as opium, or as a preparation of opium, and, à fortiori, it could not be described as chloroform; it is therefore necessary for us, if we decide against the defendants, to hold that the Act applies to something more than a scheduled poison or its preparations; in other words, that an article may be poisonous which does not consist exclusively either of a poison itself or of what can be designated as a preparation of a poison.

Is then the operation of the Act limited to that which consists exclusively of a scheduled poison or of some of its preparations? I think not. The purport of this legislation is shewn by the provisions of s. 17; for after prescribing the precautions to be taken by chemists in the sale of the poisons mentioned in the schedule, it goes on to say that the provisions of the section are not to apply to the supplying of medicine by legally qualified apothecaries to their patients, nor to any article when forming part of the ingredients of any medicine dispensed by a person registered under the Act. That exception shews that the legislature contemplated that but for its insertion in the Act a medicine, one of the ingredients of which was a scheduled poison,

would be within the Act and would come within its prohibition. This seems a very strong argument to shew that the legislature did not intend to limit the operation of the Act either to a mere poison or to a preparation of a poison, in the sense of excluding every other compound or ingredient sold. This is not merely my own view, but it is the view expressed in *Berry* v. *Henderson* (1); in that case it was not a mere dictum, but was necessary to the decision. There the thing sold was prussic acid mixed with rose-water, and the seller, a registered chemist, was prosecuted under s. 17; it was suggested that some of the formalities prescribed by that section had not been complied with; but it was conceded throughout the case that the mixture, which was very largely diluted, and which was, taken in its entirety, neither prussic acid nor a preparation of prussic acid, was a poison, and that the seller had been properly convicted unless he could bring himself within the exemption by shewing that the mixture was a medicine into which poison entered as an ingredient. The Court thought that, although there were only two things in the compound, prussic acid and rose-water, that did not prevent the prussic acid being only an ingredient; and they further held that, having regard to the purposes to which it was to be applied, the compound might be described as a medicine, and was therefore within the exemption. But to reach that conclusion it was necessary first to find that it fell within the general provisions of the Act before the exemption could attach to it. In his judgment Lush, J., says: "I am of opinion that the appellant has brought himself within the proviso in s. 17. The first part of the section, the enacting part, applies to the sale of poisons, and amongst the poisons enumerated is prussic acid. I observe that the schedule seems to treat all the poisons as sold in their simple state or in some form of preparation alone, and it does not appear to contemplate any of them being mixed up with other ingredients—it applies to them pure and simple. But taking the general sweeping words of the enactment alone, they would have prohibited any medical man, perhaps, from dispensing a prescription that contained a poison. In order to obviate that, the proviso is inserted, which says that none of the

(1) Law Rep. 5 Q. B. 296.

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provisions of this section 'shall apply to any medicine supplied by a legally qualified apothecary to his patient, nor apply to any article when forming part of the ingredients of any medicine dispensed by a person registered under this Act.'" The view of that learned judge, therefore, seems to have been that the Act applied to the sale of a compound which was made up in part of a scheduled poison, and it seems to have been necessary to his decision that he should entertain that view; it is a distinct authority for the proposition which I am now laying down. When that proposition is once established the question of whether there is more or less of a scheduled poison in the compound is not one that has any logical bearing on the question until we arrive at the principle de minimis non curat lex. But it is not necessary for us to lay down any principle of universal application, or any principle beyond that which applies to this particular case, for there cannot be the faintest doubt that in the present case a scheduled poison constituted a very considerable factor in the composition of the article sold. That decides, in my view, the first point against the defendants, that is, that chlorodyne is a poison.

Before passing to the next point, I must deal with a very forcible argument addressed to us on the wording of s. 17. It is said, and I think rightly, that the word "article" in the latter part of the section, in the proviso, means the poisonous element only, and not the whole compound; the words are, "nor apply to any article when forming part of the ingredients of any medicine dispensed by a person registered under this Act." But if the use of the word "article" in the earlier part of the section obliges a chemist to enter the quantity of the poison sold—that is, if "article" bears the same meaning in both parts of the section—he cannot, it is contended, in the case of a proprietary medicine, such as chlorodyne, comply with the requirements of the section, for he does not know the exact amount of poison contained in the medicine, and therefore cannot enter in his book the quantity of the scheduled poison that he is selling, but only the quantity of the compound. I do not think it is necessary to place the same meaning on the word "article" in both branches of the section, although I am averse to putting different meanings on

the same word in the same section. There seems, however, to be a certain laxity in the way in which the word is used by the legislature in the first part of the section, and it may fairly be construed to mean the thing sold, if and when that thing, in the opinion of the Court, comes under the designation "poison." For the reasons I have given, chlorodyne does, in my judgment, on the whole, come under this designation, although it does not consist exclusively of a scheduled poison and cannot properly be described as a preparation of one; and having once arrived at the conclusion that the thing sold may be properly designated as a poison, I feel no difficulty in holding that the obligation upon the chemist selling it to put down the quantity of the poison sold would be satisfied by entering the quantity of the particular compound—in this case it might be the bottle of chlorodyne—and that it would not be necessary to put down the quantity of scheduled poison contained therein.

Then comes the second point, which for some time considerably impressed me: whether the appellants have brought themselves within the exception in s. 16 in favour of persons making or dealing in patent medicines. It is said that the expression "patent medicine" is a rough way of describing medicines that are dealt with in the same way as patent medicines under the legislation relating to stamps, and that there was evidence before the learned county court judge that at the time of the passing of the Act of 1868 the term "patent medicine" was not confined to what can be technically so described—that is, medicines in respect of which letters patent have been granted; but that it meant broadly speaking, proprietary medicines; and it was contended that the same meaning should be given to it in this section. I have come, however, to the conclusion, having regard to the object of this statute and to the provisions of 52 Geo. 3, c. 150, that we ought not to put on the expression "patent medicines" in the Act of 1868 a meaning which would so very greatly enlarge its primâ facie meaning—that is, a medicine that is the subject of letters patent. What is the object of the Act? It deals with the sale of poisons; its title shews that it is intended to regulate their sale, and to alter and amend the Pharmacy Act, 1852. Broadly speaking, therefore, it deals with the sale of

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poisonous drugs, and does not deal, as has been suggested, with the sale of soap and things of that nature. The legislature was dealing with the safety of the public in the dispensing of poisonous drugs, and insisted on such things being only dealt with by competent persons, making, however, an exception in favour of the class of patent medicines. The onus lies on the person who says that the term "patent medicine" means something other than patent medicines in the strict sense of shewing why other medicines should be brought within this exception, and the only reason suggested is that it would be manifestly unjust to include proprietary medicines in the provisions of the Act. In my opinion, no satisfactory case has been made in favour of sweeping the very large class of proprietary medicines into the immunity extended to patent medicines, the object of the Act being for the safety of the public to secure that compounds into which a scheduled poison enters—for that is now my view of the Act—shall only be dispensed by persons having a technical knowledge of their properties. Can there be anything more dangerous than to allow a medicine which is called a proprietary medicine, but which may contain poison to any amount, to be sold or compounded by any unskilled person who chooses to compound or sell it? Such a person, intending to put in a grain of poison, might put in a drachm, and then the very mischief and danger would be open to the public which the Act was passed to meet. That mischief does not exist in the case of patent medicines, for any one can find out the exact ingredients used in them; but the case is altogether different with those which are merely the subject of some proprietary right.

That proposition is emphasized when we examine the definition in the Stamp Medicines Act, 1812, an Act which deals not only with patent medicines, but also with proprietary medicines, and which contains very large words as to what comes within that description. The schedule includes "all other pills, &c., and all other chemical and officinal preparations whatsoever, to be used or applied externally or internally as medicines or medicaments for the prevention, cure, or relief of any disorder or complaint incident to or in anywise affecting the human body, made, prepared, uttered, vended, or exposed to sale by any person or persons

whatsoever, wherein the person making, preparing, uttering, vending, or exposing to sale the same"—it then goes on to mention separately patent medicines in the proper sense of the term, that is, medicines prepared or sold under the authority of letters patent under the great seal, and then deals at length with nostrums and proprietary medicines. The effect of yielding to the defendants' contention would be that practically any person, with however slight a claim to a proprietary right, might put forward a claim, or send out a compound with an advertisement claiming that it was a nostrum or a specific, and so bring that compound within the designation of a proprietary medicine, and as such get for it that complete immunity which is accorded to patent medicines. That is to say, a person, however ignorant, might mix and sell as much poison as he chose, without leaving any trace of such sale that could be followed up if investigation became necessary, although one of the main provisions of this Act is that whereby the amount of poison sold and the person to whom it is sold can be traced. In my opinion, therefore, no case has been made for including proprietary medicines within the class of patent medicines; the language of the section is against the defendants; they have not discharged the onus which lay upon them, nor have they satisfied me that the principles of justice and of common sense are in their favour.

It is said that our decision will stop the sale of proprietary medicines: that a person who is not a chemist will be unable to sell them because they are poisons, and a chemist will be unable to sell them except under conditions with which it is impossible for him to comply. That is the argument upon s. 17; but upon dissecting it I am not much impressed with it; for if a proprietary medicine is one which it is worth the while of the public to buy and of the chemist to sell, it is worth the latter's while to ascertain by analysis the quantity of poison or deleterious ingredient which it contains; and when that is once ascertained a chemist would have no difficulty in complying with the requirements of s. 17 by entering in his book the amount of the poisonous ingredient. That is a difficulty which can be overcome, and which does not involve so great an inconvenience as the public

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danger which would result from incompetent persons being at liberty to dispense poisons as they chose.

Appeal dismissed. (1)

Solicitors for plaintiffs: *Flux, Son & Co.*
Solicitors for defendants: *Neve & Beck.*

W. J. B.

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April 19.

[IN THE COURT OF APPEAL.]

KEARNEY, APPELLANT; WHITEHAVEN COLLIERY COMPANY, RESPONDENTS.

Mine—Wages—Payment by Weight of Mineral—Special Agreement for Deductions, Validity of—Contract—Illegal Stipulation, effect of, where Good Consideration for Contract—Coal Mines Regulation Act, 1887 (50 & 51 *Vict.* *c.* 58), *s.* 12.

By s. 12 of the Coal Mines Regulation Act, 1887, where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten—provided that nothing in this section shall preclude the owner of the mine from agreeing with the persons employed that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, such deductions being determined in such special mode as may be agreed upon between the owner and the persons employed.

The appellant was employed by the respondents at their colliery upon the terms that he should be paid wages according to the weight of coal gotten by him; that he should not leave his employment without giving fourteen days' notice, and that deductions should be made in respect of dirt sent up to the surface with the coal; and the following special mode of determining those deductions was agreed upon between the respondents and the persons employed by them:—About one tub in twenty sent up to the surface was selected at random for testing. The dirt in that tub was separated from the coal and weighed, and if the tub contained more than a certain weight of dirt, the man who sent it up was not paid anything in respect of the coal therein. The men sending up the other nineteen tubs were paid on the total weight of the contents of each tub as though it contained coal only:—

Held, that the proviso in s. 12 was controlled by the first part of that section, and did not authorize any agreement by which a person employed was not to be paid on the weight of the coal in a particular tub; that the agreement with respect to the special mode of making deductions for dirt was therefore illegal,

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(1) Leave to appeal was given, but no appeal was brought from the decision.

but that the illegality in that respect did not vitiate the whole contract of employment so as to justify the appellant in leaving without giving fourteen days' notice.

APPEAL from a judgment of the Queen's Bench Division upon a case stated by justices of the peace for the county of Cumberland, under the Summary Jurisdiction Act, 1879.

The respondents, a colliery company, took out a summons under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), against the appellant, a collier in their employment, claiming 7*s.* 6*d.* damages for breach of contract by the defendant in neglecting to proceed to or perform his duties as a collier in William Pit, on March 3 and 4, 1892. The material facts appearing in the case originally stated by the justices, and in a supplemental case stated by them on hearing further evidence, after the original case had been remitted to them by the Court of Appeal for that purpose, were as follows:—

Prior to March 3, 1892, the appellant entered into a contract of service with the respondents, and signed a document of which the material parts were as follows: "I, the undersigned, in consideration of being employed at this colliery, do hereby agree to give to, and to receive from, the Whitehaven Colliery Company fourteen days' notice to terminate such employment; and, in the event of my leaving without giving such notice, to render myself liable to be proceeded against according to law. And I also further agree that breach of rules on my part shall render me liable to instant dismissal. . . . . And I also further agree to the company making the undermentioned deduction from my wages, namely . . . . moneys advanced by the company on my behalf for any of the following purposes, namely, contributions to friendly society or club, or for the education of my children, house-rent, and fines for dirt."

The wages paid to the persons employed in the mine were paid according to the weight of coal gotten by them; the dirt referred to in the contract was dirt—not being coal, nor of the nature or substance of coal—sent up from the mine with coal. For a long time prior to December 2, 1891, a system of fines and forfeitures had been in force at the pit in respect of dirt sent up with the coal. The practice was that about one tub in twenty

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was tested for dirt by testers employed by the mine-owners, the check-weigher employed by the men having the opportunity of checking the testing if he desired to do so. The dirt was separated from the coal by riddling, and weighed. On December 2, 1891, a revised scale of fines and forfeitures in respect of dirt was arranged between the employers and the men employed in the pit. By that arrangement there was no fine or forfeiture if, after the coal was riddled, the amount of dirt in the tub (which would contain about 15 cwt.) did not exceed 25 lbs. If the amount of dirt after riddling exceeded 25 lbs., but did not exceed 35 lbs., one-half of the tub was to be forfeited, the collier who sent the tub up receiving payment only in respect of half the weight of the total contents of the tub. If the amount of dirt after riddling exceeded 35 lbs., then the whole tub was forfeited, the collier who sent it up receiving no payment in respect of it. The tubs were selected for testing at random, and the name of the collier who sent up the tub was not ascertained until the tub had been emptied, when his tally would be found at the bottom of it.

On March 3 and 4, 1892, the appellant did not proceed to his work at the pit. He had not previously given the fourteen days' notice of his intention to leave the respondents' employment required by the contract. At the hearing before the justices the appellant's solicitor contended that the system of making deductions in respect of fines for dirt was illegal, and that the appellant therefore was not bound by the contract of employment, and was justified in refusing to work under it. The justices held the appellant liable in damages; and, being satisfied upon the evidence given for the respondents that by reason of the appellant's not proceeding to work on the days named they had suffered the damage claimed, ordered him to pay to them the sum of seven shillings and sixpence.

The questions for the opinion of the Court were—(1.) whether the justices were right in holding that the appellant was not justified in leaving his work without notice; and (2.) in the event of the appellant not being justified in leaving his work without notice, were the justices right in holding that the appellant was liable in damages to the respondents? If the Court should be of opinion that the justices were wrong in either of

those points, then the order to be quashed and judgment entered for the appellant. If the Court should be of opinion that the justices were right, then the order to stand.

The Divisional Court (Grantham and Charles, JJ.) gave judgment for the respondents. Grantham, J., was of opinion that the special mode of determining the deductions to be made in respect of fines for dirt, which had been agreed upon between the respondents and their workmen, was not in contravention of the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 12 (1), and that, under the proviso in that section, the mine-owner and the persons employed by him were entitled to agree upon a deduction from the latters' wages in respect of stones and substances other than minerals sent up with the coal, even although the special mode of determining the deduction involved that the person employed was not paid anything in respect of the weight of the coal in the particular tub selected for testing. The learned judge was also of opinion that the decision of the House of Lords in *Netherseal Colliery Co.* v. *Bourne* (2) (in which the question turned upon a deduction in respect of coal, and

(1) Sect. 12: "Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable.

"Provided that nothing in this section shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs, baskets, or hutches being improperly filled in those cases where they are filled by the getter of the mineral or his drawer, or by the person immediately employed by him; such deductions being determined in such special mode as may be agreed upon between the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other, or by some person appointed in that behalf by the owner, agent, or manager, or (if any check-weigher is stationed for this purpose as hereinafter mentioned) by such person and such check-weigher, or, in case of difference, by a third person to be mutually agreed on by the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other, or in default of agreement appointed by a chairman of a court of quarter sessions within the jurisdiction of which any shaft of the mine is situate."

(2) 20 Q. B. D. 606; 14 App. Cas. 228.

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not in respect of stones or substances other than the mineral contracted to be gotten) was not contrary to his view of the construction of the section.

Charles, J., was of opinion that the system of fines and forfeitures adopted at the respondents' colliery was in contravention of the provisions of s. 12; because, by the first part of the section, the person employed was to be paid according to the actual weight gotten by him of the mineral contracted to be gotten; and the decision in *Netherseal Colliery Co.* v. *Bourne* (1) indicated that the only deductions allowable were deductions in respect of stones and substances other than the mineral contracted to be gotten. The learned judge thought it was impossible to hold that a system by which, in certain events, the person employed was no longer to be paid according to the actual weight gotten by him of the mineral contracted to be gotten, was justified by the proviso in s. 12.

Both the learned judges, however, held that, whether or not that part of the contract of employment was illegal, the illegality did not render the whole contract void so as to disentitle the respondents to rely upon the stipulation that the appellant should not leave the employment without giving fourteen days' notice.

The appellant below appealed from this decision.

Willis, Q.C., and *Atherley Jones*, for the appellant. The special mode of determining the deductions for fines, which has been agreed upon between the colliery company and those whom they employ, is in contravention of s. 12 of the Mines Regulation Act, 1887, and, therefore, illegal. The effect of s. 12 is to prohibit any contract by which the person employed is not to be paid according to the actual weight gotten by him of the mineral contracted to be gotten. He must be paid by weight and without any deductions from the weight of the mineral which he sends up. The proviso does not override the first part of the section. It only provides for the mode in which deductions from the weight sent up to the pit's mouth (including both the mineral contracted to be gotten and other substances) should be

(1) 20 Q. B. D. 606; 14 App. Cas. 228.

made; but the special mode can only be by deduction from weight, not from payment. That is the construction put by the House of Lords in *Netherseal Colliery Co.* v. *Bourne* (1) upon s. 17 of the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), which is substantially the same in terms as s. 12 of the Act of 1887. In the present case, by the agreed special mode of determining the deductions to be made in respect of fines for dirt, the miner, in the event of the tub selected for testing containing more than a certain proportion of dirt, is not to be paid anything on the actual weight of the coal in that tub. The deduction is, therefore, illegal.

Next, if that be so, it is submitted that the whole contract of employment is vitiated, because the services rendered by the person employed are paid for in a mode prohibited by the statute, which requires that the contract shall be of a particular character. If the term of the contract with respect to those deductions be illegal, it affects, or cuts through, the consideration, namely payment, passing from the mine-owner to the person employed; and, if the consideration be tainted with illegality, the whole contract is bad. The mine-owners, therefore, are not entitled to rely on the term in the contract with respect to notice, and the appellant was entitled to leave his employment without giving the fourteen days' notice stipulated by the contract.

Finlay, Q.C., and *Mattinson*, for the respondents. The special agreement made here is not illegal. It is only a mode of ascertaining the average amount of dirt sent up in the tubs. Assuming that s. 12 of the Coal Mines Regulation Act, 1887, means that in any event the person employed shall be paid for the weight of the coal actually gotten by him, still in fact he is so paid under the special agreement, because, although the man whose tub is tested out of the twenty tubs sent up receives no payment at all on the weight of the coal in that tub if it contains more than 35 lbs. of dirt, he is paid on the weight, both of coal and dirt, in so many of the other nineteen tubs as he has sent up. As the result works out, he is paid, or more than paid, for the weight of coal actually gotten by him. The contention made for the appellant would necessitate the expensive

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and troublesome process of weighing for dirt every tub that came to the pit's mouth—a process which it would be practically impossible for the mine-owner to carry out. It is submitted, further, that the proviso to s. 12 intended to allow any special bargain with respect to deductions to be made between the mine-owner and the persons employed. It provides that deductions may be made for tubs improperly filled, shewing that some deduction from the coal sent up was contemplated. The decision in *Netherseal Colliery Co.* v. *Bourne* (1) was in respect of a deduction from the weight of coal in the basket. The House of Lords had not to consider deductions in respect of substances other than the mineral contracted to be gotten; it was, therefore, only necessary for them to construe the first part of the section. Next, if the special agreement with respect to deductions be illegal, it does not vitiate in toto the contract of employment. The test is, if the acts to be done by the person employed as consideration for the wages paid him are illegal in whole or in part, then the whole contract is illegal. If, on the other hand, the consideration moving from the master—i.e., the employment of the person employed and payment of wages—is illegal in whole or in part, then the whole contract is illegal. But this stipulation as to deductions in respect of fines for dirt is no part of the consideration for the service. It is a stipulation in favour of the master. It is one of the promises in the contract which is bad in itself, though the consideration upon which it is founded is good; but it does not touch the other promises in the contract which are good in themselves and supported by the good consideration. The mine-owners, therefore, were entitled to rely on the appellant's promise not to leave his employment without giving fourteen days' notice.

Atherley Jones, replied.

LORD ESHER, M.R. I am of opinion that this appeal should be dismissed. I think that the judgment of Charles, J., was right, and I cannot agree with the judgment of Grantham, J., with respect to the legality of the deductions. I think that the deduction in respect of fines for dirt was an illegal deduction, but

(1) 20 Q. B. D. 606; 14 App. Cas. 228.

that the illegality of that particular stipulation, there being no illegality in the consideration for the contract, does not affect the validity of the promise made by the miner not to leave his employment without giving fourteen days' notice. The point as to the illegality of the stipulation that the mine-owners may make deductions in respect of fines for dirt depends upon the construction of s. 12 of the Coal Mines Regulation Act, 1887. I think that that section has really been construed by the House of Lords in *Netherseal Colliery Co.* v. *Bourne* (1). That decision was founded upon particular propositions with regard to the Act of Parliament, and we cannot, on the suggestion that it was not necessary in that case to determine the point now before us, disregard the interpretation the House of Lords gave to that Act. I take the judgment of the House of Lords to be founded upon certain propositions enunciated and laid down in terms by several—if not all—of the noble Lords. Those propositions are most clearly stated by Lord Halsbury. They are in effect, that you must take the whole of the section which was then under consideration, and consider the first part of it with the proviso in order to determine what is the true construction of the first part. If you put one construction upon that proviso you give hardly any effect to it; if you put the other construction you make the first part and the proviso work harmoniously together. Lord Halsbury says that the phraseology of the first part of the section is general, but that it may be construed into a concrete form by having regard to the practical usage of miners when the Act was passed. He applies that well-known rule of interpretation. He says that the words "where the amount of wages paid to any of the persons employed . . . depends on the amount of mineral gotten by them," might mean, "where the amount of wages paid depends upon the amount of actual mineral gotten by them;" but looking at the practical usage of miners and the ordinary course of business in mining, the words may have another meaning. The well-known usage and course of business is that the miner gets an ascertained quantity of stuff, which is put into a tub and sent up to the surface. When the tub comes to the mouth of the pit, its contents are, according to the practical

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usage of miners and the ordinary course of business in mining, taken to be the amount of mineral gotten by the miner, though in the strict interpretation the tub contains the amount of mineral gotten by the miner and something else. If the first part of the section stood alone, we might be obliged to consider whether we could so deal with it; but the proviso makes it clear that we ought to apply the rule of construction I have stated, and then the "amount of mineral gotten by them" means the amount of mineral which a man, in the ordinary course of the business of mining, puts into the tub and something else. It means everything that is in the tub, whether or not there is matter in it which is not mineral. If that be so, the mine-owner would be paying on the weight of mineral which had not been gotten unless the statute provided some means of aiding him. We know that it would be practically impossible for him to have every tub weighed for dirt. The Act, however, by the proviso arranges a method of aiding him, and says that deduction shall be made in respect of stones or substances other than the mineral contracted to be gotten. Now, what are you to deduct from? From what is in the tub—not from the actual mineral in the tub, but from all that is in the tub. But the deductions must be made in a certain way. The proviso says that an agreement may be made, with respect to deductions, between the mine-owner and the persons he employs; but he and they must at the same time agree that the deductions shall be made in the particular manner specified in the Act. The things in respect of which the deductions are to be made are stones and substances other than the mineral contracted to be gotten, and the deduction must be from the weight in the tub, not from the men's wages. It is true that the amount of the wages depends upon the weight of the mineral contracted to be gotten; but I think that the wording of the first part of the section and of the proviso bring one to the conclusion that the deduction must be from weight, and must be a deduction in respect of things other than the actual minerals. As to the other matter of deduction, namely, in respect of tubs improperly filled, I think the meaning is that you are to take the weight of the tub and to deduct that which has got into it by improper filling. The provision is

pointed at the case referred to by Lord Macnaghten in the *Netherseal Case* (1), where an undue proportion of slack or dust has been sent up in the tub. In that case a deduction may be made in respect of improper filling, although the slack or dust is coal. The deduction from the weight would be made by taking out the slack or dust improperly put into the tub. The judgments in the House of Lords establish that the deduction can only be by weight; that it must be a deduction from the weight of the tub; that you can only make the deduction in respect of substances other than coal, and that you can only make it in the mode specified by the Act. Lord Halsbury says (at p. 234): "The object and intention of the 17th section, upon which this question turns, is obviously, in cases where the wages depend upon the weight of the mineral won, to create a statutable duty to weigh and to pay according to the weight so ascertained. It is obvious further that the draftsman or some person familiar with mining feared whether in creating that duty and imposing the obligation to pay according to the weight so ascertained—knowing that such weight would have to be ascertained according to the practical usage of miners—feared, I say, that if the earlier part of the section remained unqualified the mine-owner would be obliged to pay by weight, when so ascertained, whatever might be contained in the tubs, baskets, or hutches, and accordingly the latter part of the section was introduced to save the right of contracting that stone or materials other than the mineral contracted to be gotten should be deducted from the weight; but this reserved right of contract was only capable of being put in force by the mode pointed out in the section." Lord Halsbury therefore thought that if the first part of the section stood alone the mine-owner would have to pay on all that came up in the tub, basket, or hutch, but that the proviso was made to meet that state of things, and enable deductions to be made in respect of materials other than coal. Lord Bramwell says: "The effect of the enactment then is that the men must be paid by weight, that that weight is to be the weight of all they send up, but that from it may be deducted the weight of certain matters provided that weight is ascertained in a certain way."

(1) 14 App. Cas. 228, at p. 246.

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The "certain matters" are the matters mentioned in the proviso, namely, stones or materials other than the mineral contracted to be gotten. The same thing is said in effect by Lord Herschell and the other members of the House of Lords present. Lord Macnaghten says: "One thing is clear, that no deduction is permissible except what the Act specifies and allows."

The judgment of Grantham, J., in the Court below, seems to proceed on the assumption that the deductions contemplated by the proviso can be properly made from wages. Having regard to the judgments in *Netherseal Colliery Co.* v. *Bourne* (1), I am of opinion that his view is wrong, and that Charles, J., was right in saying that the person employed in the mine is to be paid by the weight of the mineral gotten; that the deduction must be from weight; that it must be a deduction from the total weight of the contents of the tub, and that it can only be made in the special mode authorized by the section. When you deduct from weight what you are allowed to deduct by the Act, the person employed is only to be paid upon the weight of coal in the tub in respect of which the deduction has been made. In the absence of an agreement as to deductions between the mine-owner and the persons employed by him, he must pay upon the whole tub. If he and they do agree, the deductions must be made in the way pointed out by the proviso. In the present case they have gone further than that. In a particular event, after deducting the extraneous matter in the tub, though an amount of coal is left in the tub, the man who sends up the tub is not to be paid wages at all in respect of the coal so brought up. I am of opinion that such a contract is illegal and in contravention of the terms of the Act of Parliament. Whether the men are wise in having brought this matter forward, I cannot say. The arrangement has been acted upon for years with their assent, and the consequences of raising the point may be what they do not expect.

Then comes the question, Does the illegality, in this respect, of part of the contract make the whole contract illegal? Does it make illegal the stipulation by the person employed that he shall not leave his employment without giving fourteen days'

(1) 20 Q. B. D. 606; 14 App. Cas. 228.

notice? I take it that the rule is properly enunciated and stated in Maxwell on Statutes, 2nd ed. p. 491. If the consideration, or any part of it, is illegal, then every promise contained in the agreement becomes illegal also, because in such a case every part of the consideration is consideration for the promise. But suppose there is nothing illegal in the consideration; then upon that valid consideration may be several promises or liabilities. If any one of those be in itself illegal, then it cannot stand, not because the consideration becomes illegal, but because the promise itself is illegal. It is a bad promise which cannot be supported by the consideration. But the other promises which are good and legal in themselves remain, and can be supported by the good consideration. That rule of law has long been acted upon, and it was applied by the House of Lords in the *Netherseal Case*. (1) Now the contract here is a contract of employment. The consideration on the one side is, "If you will enter into my employment I will make you one, two, or more several promises." The consideration on the other side is, "If you will take me into your employment, I will make you one, two, or more several promises." Therefore on both sides there is consideration which stands without any blemish whatsoever. On the one side there is the consideration, "I will take you into my employment"; on the other, "I will enter into your employment." There is a stipulation in the contract which is illegal in itself, and cannot therefore be supported by the good consideration; but there are other promises not illegal in themselves which can be supported by the consideration which is perfectly good. The promise by the person employed to give fourteen days' notice before leaving the employment is one which can be supported by the consideration, and one on which, in my opinion, the mine-owners are entitled to rely. The stipulation with respect to deductions is illegal in itself, and cannot stand, but the stipulation as to notice is legal and supported by a good consideration.

I am of opinion, therefore, that the decision of the magistrates was right, and that the judgment of the Court below should be affirmed, and this appeal dismissed.

(1) 20 Q. B. D. 606; 14 App. Cas. 228.

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LOPES, L.J. I am of the same opinion. I think that the judgment of Charles, J., was right. I think that the deductions made by the mine-owners in respect of fines for dirt are deductions not authorized by the Act, and illegal; but that the contract of employment is only illegal in part, so that the provision in it that the person employed shall give fourteen days' notice before leaving the employment is valid. The question turns on the construction of s. 12 of the Coal Mines Regulation Act, 1887. It may be truly said that the language of that section is not wholly clear and unambiguous. In the first part of the section [The Lord Justice read it] it is, in my opinion, obvious from the expressions used—namely, "weight" and "truly weigh"—that every word in the section is meant to refer to payment according to weight. I think that the words "shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten," are intended to refer to the whole of the stuff in the tub when it comes to the pit's mouth. That construction makes the provisions of the section intelligible, and it is the construction adopted by the House of Lords in *Netherseal Colliery Co.* v. *Bourne.* (1) When we come to the deductions dealt with by the proviso, I am clearly of opinion that the words, "nothing in in this section shall preclude the owner . . . of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten," refer to deductions in respect of weight. In my view the intention of the legislature was that the men should, in any event, be paid according to weight for the mineral actually gotten by them. The mine-owner is entitled to make certain deductions in weight, in respect of stones and substances other than minerals, from the quantity brought up in the tub to the pit's mouth; but it is essential that the men should be paid according to the weight of the actual coal gotten by them and contained in the tubs. In the present case an agreement has been made between the masters and the men, that if a tub of 15 cwt. contained over 25 lbs. of dirt, the men were to be paid on one-half only of the weight of the tub; and if it contained over 35 lbs. of dirt, they were to be paid nothing at

(1) 20 Q. B. D. 606; 14 App. Cas. 228.

all in respect of the coal in the tub. Such an arrangement appears to me to be in contravention of the proviso to s. 12, and therefore unlawful. It has been argued that the result of that unlawful provision is to vitiate the whole contract of employment. The law is clear that where the consideration for a promise or promises contained in the contract is unlawful, the whole agreement is void. The reason is that it is impossible to discriminate between the weight to be given to different parts of the consideration, and therefore you cannot sever the legal from the illegal part. But where there is no illegality in the consideration, and some of the provisions are legal and others illegal, the illegality of those which are bad does not communicate itself to, or contaminate, those which are good, unless they are inseparable from and dependent upon one another. Here the consideration moving from the master to the men is the employment and the payment of wages. The consideration moving from the men to the master is the services rendered by them. Both are good and lawful considerations. Then we come to the stipulation with respect to deductions. I am of opinion that that stipulation is altogether separable from and independent of the consideration. It follows that Charles, J., was right in holding that the promise to give fourteen days' notice was separable from the promise as to deductions, and that the one promise should be given effect to, and the other not. I think, therefore, that this appeal should be dismissed.

A. L. SMITH, L.J. I am of the same opinion. The proceedings taken by the respondents against the appellant were founded upon a breach by the appellant of his contract by leaving the employment without giving fourteen days' notice. The proceedings were taken under the Employers and Workmen Act, 1875, and the defence raised was that by virtue of s. 12 of the Coal Mines Regulation Act, 1887, the stipulation in the contract with respect to deductions was illegal, and that the whole contract was thereby rendered illegal, so that the appellant was entitled to disregard the provision about giving notice. It is admitted that what has been done was agreed to by the men, and has been going on for years, and probably may have been

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beneficial to them. What has been done is this:—They do not weigh for dirt every tub which comes to the top, but they give the men the benefit of nineteen out of twenty tubs. They test about one tub in twenty, no matter by what man it is sent up. If it contains no more than 25 lbs. of dirt, then no drawback is made. If it contains more than 25 lbs. and not more than 35 lbs., then a drawback of one half the weight of the coal in the tub is made; and if it contains more than 35 lbs., then no payment at all is made for the coal in the tub. Now, in my judgment, the House of Lords has practically put this construction on the section:—A pitman, when paid by weight, must be paid according to the weight of the coal he actually wins, but by the proviso the master may agree with him to make deductions from the total weight of what is sent up in the tub in respect of stones and substances other than mineral. If all that had been done here was to agree upon some mode of finding out what was the average amount of dirt in a given number of the tubs sent up, without weighing every one of them, I do not think any difficulty would arise under the section; but what was done was this: when a certain proportion of dirt was found in the tub selected for testing, the actual coal in that tub was not paid for at all. In face of that, can it be said that the provisions of s. 12 have not been disregarded? I am of opinion that they have. Then the question is, Does that illegal part of the agreement vitiate the whole? Charles, J., has held that it does not; and I think his reasons for coming to that conclusion are well founded. The rule is, that if the consideration is tainted with illegality, either in whole or in part, all the promises depending upon that consideration must fail; but if the consideration be not tainted with illegality, either wholly or in part, then if one of the several promises depending upon it be illegal in itself and the others legal, the legal promises stand, and may be enforced against the person who has made them. In the contract before us the master agrees to employ the man, who, in consideration that the master will take him into his employment and pay him wages, promises to serve the master, and not to leave the employment without fourteen days' notice. Both considerations from the man to the

master and from the master to the man are good. Then there is one promise—that with respect to the deductions—which is illegal and cannot be enforced. But the promise which the master is here seeking to enforce against the servant is not illegal. It is founded upon a good consideration; and I am, therefore, of opinion that the defence set up by the appellant fails. This appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Wood & Wootton, for T. Milburn, Workington.*

Solicitors for respondents: *Harrison & Powell, for T. Brown, Whitehaven.*

W. A.

[IN THE COURT OF APPEAL.]

TEMPERTON *v.* RUSSELL AND OTHERS.

Action, Cause of—Maliciously procuring Breach of Contract, Action for—Conspiracy to injure Person by preventing others from dealing with him—Trade Union.

The defendants were members of a joint committee of three trade unions connected with the building trade in Hull. A firm of builders there having refused to obey certain rules laid down by the unions with regard to building operations, the unions sought to compel them to do so, by preventing the supply of building materials to them. In pursuance of this object, they requested the plaintiff, a master mason and builder in Hull, who supplied building materials to the firm, to cease to supply them with such materials, but the plaintiff refused to do so. Thereupon, with the object of injuring the plaintiff in his business, in order to compel him to comply with such request, the defendants induced persons who, to the knowledge of the defendants, had entered into contracts with the plaintiff for the supply of materials, to break their contracts, and not to enter into further contracts with the plaintiff, by threatening that the workmen would be withdrawn from their employ. The plaintiff sustained damage in consequence of such breaches of contract, and of the refusal of such persons to enter into contracts with him:—

Held, that an action was maintainable by the plaintiff against the defendants for maliciously procuring such breaches of contract, and also for maliciously conspiring together to injure him by preventing persons from entering into contracts with him.

The right of action for maliciously procuring a breach of contract is not confined to contracts in the nature of contracts of personal service.

APPLICATION by the defendants for judgment or new trial.

The plaintiff, a master mason and builder at Hull, sued the

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defendants, who were respectively the presidents and secretaries of three trade unions at Hull, called the Hull Branch of the Operative Bricklayers' Society, the Hull Branch of the Builders' Labourers' Society, and the Hull Branch of the Operative Plasterers' Society, and of a joint committee of such trade unions, and members of such committee, for (1.) unlawfully and maliciously procuring certain persons who had entered into contracts with the plaintiff to break such contracts, and (2.) for maliciously conspiring to induce certain persons not to enter into contracts with the plaintiff, by reason whereof the plaintiff sustained damage.

The case was tried before Collins, J., with a jury, and the facts, so far as material to this report, appeared to be as follows :— (1) Certain working rules had been established for building operatives in Hull, to which the three trade unions above mentioned and certain of the master builders in Hull were parties. The 9th of such rules provided, "that no member of the Operative Bricklayers' Society shall be permitted, under any circumstances, to contract for or take by measurement, either in the whole or part, any kind of brickwork, brick-pointing, or plastering that may have been contracted for or sub-contracted for under the original contract, nor to take any work of any master builder who is building property for himself; and that no member of this society shall be allowed to work on such jobs; that no member of these societies be allowed to work on any job where labour alone is contracted for." A firm of builders in Hull called Myers & Temperton, one of whom was the plaintiff's brother, refused to be bound by these rules, and especially rule 9. There was evidence that, in order to compel them to obey the rules, an endeavour had been made to withdraw workmen from their employ, and that members of the trade unions had been fined and expelled for working for them; but, the desired effect not being produced by this, the trade unions took steps to cut off

(1) The object has been to give an outline of the facts according to the view taken by the Court of the result of the evidence. It may be mentioned that there was considerable controversy as to the proper inferences of fact, as regards the different defendants, to be drawn from the evidence, which was in some points conflicting, and far too lengthy to be fully stated.

the supply of lime, brick, cement, and other building materials which Messrs. Myers & Temperton might require in their business, by putting pressure on those with whom they dealt for such materials not to supply them. The plaintiff, who was one of those who supplied materials to Messrs. Myers & Temperton, refused to acquiesce in the trade unions' views, and continued to supply the firm with concrete and other building materials. On September 6, 1892, the following resolution was passed by the joint committee of the three societies: "Resolved, that this committee advises the three societies to abstain from using any lime supplied by merchants who are supplying any builders that are working contrary to joint working rule No. 9, and further, that they refrain from handling or fixing any artificial stonework made by any man who is working contrary to rule 9 (see joint working rules signed by the master builders)." Artificial stonework was the material with which the plaintiff was then supplying Messrs. Myers & Temperton, and it was not disputed that this resolution was aimed at him.

It was stated by the defendant Russell in his answer to interrogatories, that it was not alleged that the plaintiff had himself broken any rule of the trade unions. The defendant Russell stated in cross-examination, that he represented the three societies in the matters in question, and there was evidence which the Court thought sufficient to justify the inference that his action in these matters was in support of the common action agreed upon by all the defendants.

On or about September 11, 1892, one Brentano, a builder, who had contracted with the plaintiff for the supply to him by the plaintiff of certain building materials, viz., concrete heads and sills, was summoned to appear before a meeting of the joint committee, which he accordingly did, and he there met the defendant Russell. Russell introduced him to the meeting, stating that he had contracted with the plaintiff, and told him that they had a dispute with the plaintiff, and that they would not allow their men to fix his goods. A meeting of the Operative Bricklayers' Society was held on September 12, the minutes of which stated that, the dispute re Myers & Temperton

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being brought before the meeting, it was resolved that all members of the society refuse to use any material that may have been supplied by any builder that is not conforming to rule 9, and that any member using or handling any material, either lime, bricks, or artificial stone, will be dealt with by the society in accordance with rule 9, and that Russell was appointed as delegate during the dispute re Myers & Temperton, and was given a free hand. Another meeting of the joint committee was held on September 19, at which all the defendants but one were present, and at which Brentano attended. The minutes of such meeting stated that he attended to give evidence with regard to a contract made between himself and the plaintiff for the supply of concrete heads and sills for fifteen houses; that he said that he had signed an agreement with the plaintiff, dated August 20, 1892, which he had shewn to Russell; but that he would not want any of these heads and sills for a fortnight; and that he promised not to use any of these until notified by the committee. The minutes also stated that an agreement from one Gibson was produced at the meeting. Brentano thereupon waited fourteen days, and then wrote to Russell stating that he was ready for the concrete goods, and had not heard from the committee; and, if he did not hear from them, he should at once get some on the job. An interview then took place between him and Russell, when the latter told him that he was not to get goods from the plaintiff, and that they had made arrangements for one Goode, a builder and manufacturer, to supply him with goods. A letter was written by Russell to Goode, to the effect that the Bricklayers' Society had promised to supply Brentano with concrete work, as he had signed a contract with a firm who were in dispute with the building trade, and that the society would guarantee payment for the goods. Brentano accordingly got what he wanted from Goode, and thereupon refused to perform his contract with the plaintiff, and took no more goods from him. He stated in evidence that he was induced to act thus by a resolution mentioned to him by Russell as having been passed, forbidding the members of the societies from working on plaintiff's materials, and because he knew his workmen would

be withdrawn if he did not. Evidence was given with regard to similar dealings by Russell with other persons, who had entered into contracts with the plaintiff, among whom was Gibson, the person mentioned in the minutes of the meeting of September 19. Gibson stated in evidence that Russell had called upon him, and told him that the committee had passed a resolution to take extreme measures as to the plaintiff's goods, that they meant to bring him to his knees before they had done with him, and that he would do no good till he made his peace with them. Russell, however, denied that he had said this. It is unnecessary to state the facts as to these other persons who had contracted with the plaintiff, further than to say that the Court of Appeal considered the evidence to justify the finding of the jury as after mentioned. It was proved that the plaintiff sustained loss through the breaches of contract by Brentano and the others to the extent of 50*l.*, and there was evidence that his business had considerably fallen off in consequence of the action taken by the defendants. The learned judge at the trial directed the jury that to induce a person who had made a contract with another to break it, in order to hurt the person with whom it had been made, to hamper him in his trade, or to put undue pressure upon him, or to obtain an indirect advantage, was in point of law to do it maliciously, and that, if the jury were satisfied that the defendants or any of them had induced persons to break contracts with the plaintiff, of the existence of which they were aware, and, if their object in doing so was to injure the plaintiff in his trade in order to compel him to do something which he did not want to do, that would be "maliciously" in point of law, and a cause of action would be established. He also directed the jury in substance, that a malicious conspiracy to prevent persons from entering into contracts with another, if followed by damage to the person conspired against, was actionable. He left the following questions to the jury: (1.) Did the defendants or any of them maliciously induce the persons named (viz., Brentano, Gibson and others), or any of them, to break their contracts with the plaintiff? (2.) Did the defendants, or any two or more of them, maliciously conspire to induce the persons named

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and others not to enter into contracts with the plaintiff, and were such persons thereby induced not to make such contracts? The jury found for the plaintiff, against all the defendants, on both heads, with 50*l.* damages on the first and 200*l.* damages on the second. The learned judge gave judgment for the plaintiff for those amounts, and for an injunction to restrain the defendants from inducing persons to refuse to take goods from the plaintiff, or endeavouring to induce persons to break their contracts with the plaintiff. The defendants moved for judgment or a new trial, on the ground that the learned judge misdirected the jury, and that there was no evidence to go to the jury in support of the plaintiff's claim against the defendants respectively.

Robson, Q.C., and *H. T. Kemp*, for the defendants Russell and another (president and secretary of the Operative Bricklayers' Society). There was no evidence to support the first head of claim, viz., that for procuring breaches of contracts; and the learned judge misdirected the jury in leaving the case to them as he did.

The evidence shews that the persons who broke their contracts with the plaintiff did so, not in consequence of anything said or done by the defendant Russell or the other defendants, but by reason of the members of the unions having, as they lawfully might, resolved not to work on the plaintiff's materials.

Workmen have a perfect right to agree together to refuse to work for employers except on certain terms. It was the duty of the defendant Russell, as a member of the joint committee, to give notice to the men of any breach of the rules of the union; and there was nothing illegal in the committee's advising the members of the unions not to handle the plaintiff's materials, in order to enforce compliance with their rules. There would be nothing illegal in the defendant Russell or any individual workman refusing for himself to handle the plaintiff's materials; nor is there anything illegal in communicating the intention so to refuse to others. The policy of the trade unions was adopted without reference to any particular contracts entered into by the employers. It is contended that the evidence does not shew

that Russell or any of the defendants knew that any particular contracts were still outstanding. No doubt it was known that the action of the unions might affect the employers' contracts; but that would be so in the case of an ordinary strike of workmen, which is nevertheless perfectly legal. In order to bring a case within the doctrine of *Lumley* v. *Gye* (1), and *Bowen* v. *Hall* (2), the plaintiff must shew that the defendant intended to induce the breach of a particular contract "maliciously," i.e., in order to injure the plaintiff, or to obtain for himself the benefit to which the plaintiff was entitled under the contract. The evidence does not shew that here. The members of trade unions have a right to withhold their labour in pursuit of their own interests, and in so doing to choose the time which will be most inconvenient to their employers. The mere fact that they know that their course of action will make it difficult for their employers to carry out contracts does not render the men liable to an action. The evidence shews that the defendants' primary object was not to induce breaches of contract with the plaintiff, but to enforce the rules. The fact that incidentally their action led to breaches of contract with the plaintiff does not render them responsible. If the men employed by a master give him notice to quit his service, he may in consequence not be able to carry out his contracts, but they are not liable for that consequence. The present case is analogous. All that the defendant Russell did with regard to Brentano and the others who had contracted with the plaintiff was merely to communicate to the employers the intention of the men to exercise their legal right. The breaches of contract were not the natural consequence of such communication. Brentano, for instance, might have carried out his contract without using the materials in question; or he might have paid compensation for his breach of contract. The same arguments apply to the second head of claim.

E. Tindal Atkinson, Q.C., and *T. Willes Chitty*, (*F. G. Newbolt*, with them), for the other defendants. There was no evidence to justify the finding of the jury in answer to the second question. It was not proved that any one was in fact prevented from contracting with the plaintiff. There is no case which shews that

(1) 2 E. & B. 216. (2) 6 Q. B. D. 333.

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it is actionable to induce persons not to contract with another if done by a single person, or that it is actionable if several combine to do so. If not wrongful if done by one, it cannot be wrongful if done by several. The combination is not of itself sufficient to render the defendants liable: *Salaman* v. *Warner* (1). The doctrine of *Lumley* v. *Gye* (2) and *Bowen* v. *Hall* (3) only applies to existing contracts.

These defendants stand in a different position from the defendant Russell. They are members of the joint committee, but not of the Operative Bricklayers' Society. It was not shewn that they authorized all that he did. Russell belonged to the Operative Builders' Society. It was the resolution of that society on September 12 which really influenced Brentano and the others in breaking their contracts. These defendants were only parties to the resolution of the committee of September 6 advising the societies not to work on plaintiff's materials. There is no evidence that they had in contemplation at that time, or even that they knew of, any outstanding contracts entered into with the plaintiff. There was no evidence of malice. The motive of the defendants was not personal ill-feeling towards the plaintiff, nor did they desire, as the defendant in *Lumley* v. *Gye* (2) did, to obtain a benefit for themselves to which they were not entitled; they merely sought to enforce their rules as they were lawfully entitled to do. The doctrine of *Lumley* v. *Gye* (2) and *Bowen* v. *Hall* (3) only applies to contracts for personal services, and would not apply to contracts for the supply of goods.

Lawson Walton, Q.C., and *Montague Lush*, for the plaintiff. The motive for the attack on the plaintiff was the fact that he refused to discontinue supplying goods to the firm of Myers & Temperton, who had declined to submit to the rules of the union. The evidence shewed that Russell was the delegate of the other defendants in what he did, and that they were all acting in pursuance of a joint purpose. That purpose was to compel the plaintiff to obey their mandates by inducing or forcing others to break their contracts with him, and not to deal with him in future. Such conduct is malicious in law. There was clearly

(1) 65 L. T. (N.S.) 132. (2) 2 E. & B. 216.
(3) 6 Q. B. D. 333.

evidence that the defendants knew of the existence of the contracts with the plaintiff, and that they did procure the breach of such contracts, and also that they prevented the persons in question from contracting with the plaintiff any more. It is said that the members of the trade unions had a right to withhold their labour from employers who refused to be bound by their rules, and that that was really all that the defendants sought to bring about, and therefore they were only doing what they had a right to do. The fallacy is apparent. If a person were maliciously to give money to another to induce him to break a contract, it would obviously be actionable. Yet it might be said that he was only doing what he was entitled to do with his own money. To exercise a lawful right for an unlawful purpose is actionable. The principle upon which *Lumley* v. *Gye* (1) and *Bowen* v. *Hall* (2) depend is, that maliciously to procure a person to break a contractual relation, which all are bound by law to respect, is actionable. It is acting for an unlawful purpose. The doctrine is not confined to contracts for personal service. There was abundant evidence here that the defendants did intentionally and maliciously procure the breach of these contracts.

It is further submitted that it is clearly actionable to conspire maliciously to prevent persons from contracting with a particular individual if actual damage is proved. See per Lord Bramwell and Lord Hannen in *Mogul Steamship Co.* v. *Macgregor, Gow & Co.* (3) and *Gregory* v. *Duke of Brunswick.* (4)

E. Tindal Atkinson, Q.C., and *H. T. Kemp*, in reply. The dicta of Lord Bramwell in the case of *Mogul Steamship Co.* v. *Macgregor, Gow & Co.* (3), upon which the plaintiff relies, referred to the case of an indictment for conspiracy which is distinguishable.

LORD ESHER, M.R. In this case I propose first to state the facts of the case, as I understand the effect of the evidence, and then my views as to the law applicable to those facts. There appear to have been three trade unions formed in Hull, consisting

(1) 2 E. & B. 216.
(2) 6 Q. B. D. 333.
(3) [1892] A. C. 25.
(4) 6 M. & G. 953.

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respectively of persons employed in each of the three branches of labour connected with the building trade there. The members of such trade unions respectively agree together to form a union, to subscribe certain amounts, and to subject themselves to certain obligations, in consideration of which they are respectively to be entitled to certain benefits. The main condition upon which the members of the union are to be entitled to the benefits of membership is, that they will obey the directions given with regard to certain trade matters by the persons authorized by all of the members to give such directions. If they do not, they may be deprived of the benefits to which they would otherwise have been entitled or expelled from the union. Therefore the members of the union have given up their liberty of action in respect of certain matters, in the sense that they have bound themselves by agreement not to exercise it on pain of losing certain benefits. These trade unions appear to have agreed together that certain rules, which they thought to be for their benefit, should be observed by the master builders of Hull, and that, if any builder would not observe such rules, they would act upon their respective members with a view to compelling him to do so. For this purpose they formed a joint committee, which appears to have been the authority appointed to determine what action should be taken by the individual members of the trade unions in respect of such building controversies, and, therefore, to have been for this purpose the agent of each of the trade unions, and of the individual members of them. Apparently this committee had power to delegate their authority to one or more individual members. I think that the evidence in this case proves that they did delegate such authority to the defendant Russell, who therefore acted in what he did as the delegate of such committee, and so of each of the three unions, and in a sense of each member of them. He, therefore, had authority to give directions to the individual members of the unions what to do in the case of building controversies. The trade unions and the joint committee seem to have come to the conclusion that a certain mode of carrying on building operations in Hull was detrimental to their interests or those of their constituents. They therefore agreed, as I have said, to a set of rules, one

of which was the 9th rule which has been referred to. As between themselves, the members of these trade unions had a perfect right to do that and to bind themselves to comply with such rules. But these rules could not bind any person who did not belong to such unions, and they had no right to enforce obedience to them by such a person. A firm of Myers & Temperton, who were builders in Hull, thought fit to carry on their business, as they had a perfect right to do, in a manner inconsistent with the terms of rule 9. The trade unions and their joint committee objected to this, and resolved to coerce the firm into carrying on their business in accordance with the rule. Failing to effect their object by direct action upon the firm, they endeavoured to coerce them through the persons who dealt with them and who supplied them with the means of carrying on their business. Among these persons was the plaintiff, a brother of one of the members of the firm. They desired to coerce the firm by preventing these persons from dealing with them. The plaintiff refused to fall in with these views, and would not agree to cease dealing with his brother's firm. Having failed in preventing him from doing so by direct action upon him, they desired to overcome his resistance and to coerce him, in the same manner as they had sought to coerce the firm, viz., through the persons who had dealings with him. The joint committee in effect said that, if any person connected with the building trade in Hull should deal with the plaintiff for materials, the members of the unions should refuse to work for that person upon goods supplied by the plaintiff. They intended thus to coerce the plaintiff to comply with their views, and they contemplated that, if he did not submit, his business would be destroyed. Though, of course, in point of law such other persons might be free to enter into contracts with the plaintiff, and would be bound to perform contracts made with him, as before, in point of fact the committee knew that the probable result would be that his business would come to an end, and they thought that the prospect of this would have a strongly coercive effect upon him.

They were not, I think, actuated in their proceedings by spite or malice against the plaintiff personally in the sense that their motive was the desire to injure him, but they desired to injure

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him in his business in order to force him not to do what he had a perfect right to do. Amongst those who had dealings with the plaintiff were two persons named Brentano and Gibson. The result of the evidence appears to me to be that the joint committee and the defendant Russell, who was acting as the delegate of such committee, knew that Brentano had entered into a contract with the plaintiff, and also, I think, that he would in the course of his business enter in the future into other contracts with the plaintiff of a similar description. Russell lets Brentano know that, if he goes on dealing with the plaintiff, harm will come to him, because none of the workmen at Hull who are comprised in the unions will touch the materials supplied by the plaintiff or will do his work. What was said by Russell to Brentano, and the previous resolution of the committee which was made known to Brentano, clearly had the object of preventing him from carrying out the contract he had already made with the plaintiff, and I should say that the inference any fair-minded man would draw would be that they also had the object of preventing Brentano from entering into contracts with the plaintiff in the future. The object was not to injure Brentano, but to injure the plaintiff in his business, in order to force him into obedience to the views of the unions. It was argued that the steps which the joint committee and Russell, their representative, took with regard to the men working for Brentano were only what they had a perfect right to take, that they merely gave notice or advice to such workmen that the rules were being infringed, and that they should withdraw from his employment if he carried out his contract with the plaintiff, and that the workmen could then do as they liked in the matter. It may be spoken of as "notice" or "advice" argumentatively; but those words do not represent the truth of the thing. These men had bound themselves to obey; and they knew that they had done so, and that, if they did not obey, they would be fined or expelled from the union to which they belonged. It was really an order which was given to them just as much as a direction given to a servant is one. It might be said that such a direction is not an order, because the servant could not be compelled to obey it; but, if he does not, he will lose his place. The unions through their

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joint committee, as it appears to me, ordered their members employed by Brentano to cease to work for him if he performed his contract with the plaintiff, or if he went on dealing with the plaintiff. I think that the meaning of what Russell said to Brentano was that, if he had made a contract with the plaintiff and proceeded to perform that contract, his men would leave him; and that, if he went on dealing with the plaintiff in the future, the same result would follow. The intention was that by so acting on Brentano the plaintiff should be compelled to obey their directions, and, if he did not, that his business should be ruined. I think that there was clearly evidence to go to the jury against all the defendants of having been parties to these transactions. They were all members of the unions and of the joint committee, and they none of them went into the box except Russell, which they would have done if they could have denied that they were parties to them. The evidence against the defendants with regard to the dealings with Gibson is substantially to the same effect. This is not simply a case of men saying that they will not work for a master if he does certain things which they do not like. Brentano and Gibson were dealt with thus for the purpose of injuring the plaintiff, in order to force him into obedience to the policy of the unions, which they had no right to impose upon him.

Then what is the law applicable to these facts? The questions of law were dealt with in the argument of the defendants' counsel boldly but briefly, the main bulk of their arguments being directed to the endeavour to make out that there was no evidence that the defendants were responsible for the matters complained of. It was argued that the action for inducing persons to break a contract is confined to cases of master and servant or cases of personal service. But the case of *Bowen* v. *Hall* (1) shews that the distinction relied on is not tenable. That was not a case of master and servant. In that case the majority of the judges in the Court of Appeal approved of the view taken by the majority of the judges in *Lumley* v. *Gye*. (2) Their judgment, after stating that merely to persuade a person to break his contract may not be wrongful in law or

(1) 6 Q. B. D. 333. 1881

(2) 2 E. & B. 216.

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fact, proceeds as follows: "If the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as *Lumley* v. *Gye* (1), and which is complained of in the present case, is therefore, because malicious, wrongful. That act is a persuasion by the defendant of a third person to break a contract existing between such third person and the plaintiff. It cannot be maintained that it is not a natural and probable consequence of that act of persuasion that the third person will break his contract. It is not only the natural and probable consequence, but, by the terms of the proposition which involves the success of the persuasion, it is the actual consequence." Nothing could be more directly in point to the present case with regard to the first ground of action set up. That case is an authority which is binding on us, and it appears to me to apply to the present case.

The next point is, whether the distinction taken for the defendants between the claim for inducing persons to break contracts already entered into with the plaintiff and that for inducing persons not to enter into contracts with the plaintiff can be sustained, and whether the latter claim is maintainable in law. I do not think that distinction can prevail. There was the same wrongful intent in both cases, wrongful because malicious. There was the same kind of injury to the plaintiff. It seems rather a fine distinction to say that, where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable. At any rate it appears to me that, on the principle acted on in the case of *Gregory* v. *Duke of Brunswick* (2), where defendants conspire or combine together maliciously to injure the plaintiff by

(1) 2 E. & B. 216.

(2) 6 M. & G. 953.

preventing persons from entering into contracts with him, and injury results to the plaintiff, it is actionable. The judgments in the case of *Mogul Steamship Co.* v. *Macgregor, Gow & Co.* (1), in the House of Lords, seem to shew that such a combination if followed by damage to the plaintiff is actionable. With regard to what was there said, the counsel for the defendants relied on the distinction between an indictment and a civil action, and said that, though such a combination might be the subject of an indictment for conspiracy, it could not be the subject of an action for damages. I agree that there is this distinction, viz., that, in the case of an indictment, when the conspiracy is proved the indictment is proved, but in the case of an action it is necessary to go further and to prove damage. Therefore it will not suffice in an action, if the jury only find that the defendants agreed together to take an unlawful course of action, but they do not find that it was taken and that damage resulted to the plaintiff, or if there is no evidence on which the jury can find that damage resulted to the plaintiff. But, if there is evidence, and they do find, that damage resulted to the plaintiff, then I think what Lord Bramwell said in the case of *Mogul Steamship Co.* v. *Macgregor, Gow & Co.* (1) applies, and the action will lie. He said: "The plaintiffs also say that these things, or some of them, if done by an individual, would be actionable. This need not be determined directly, because all the things complained of have their origin in what the plaintiffs say is unlawfulness, a conspiracy to injure: so that, if actionable when done by one, much more are they when done by several, and, if not actionable when done by several, certainly they are not when done by one. It has been objected by capable persons that it is strange that that should be unlawful, if done by several, which is not if done by one, and that the thing is wrong if done by one, if wrong when done by several; if not wrong when done by one, it cannot be when done by several. I think there is an obvious answer, indeed two: one is that a man may encounter the acts of a single person, yet not be fairly matched against several; the other is that the act when done by an individual is wrong, though not punishable, because the law avoids the

(1) [1892] A. C. 25.

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multiplicity of crimes: De minimis non curat lex; while if done by several it is sufficiently important to be treated as a crime." It seems to me that that language recognises the doctrine of law as being that, if there is an agreement to take an unlawful course of action which amounts to a conspiracy, and that conspiracy causes damage to the plaintiff, an action will lie in respect of such conspiracy. It appears to me, therefore, that the combination here entered into by the defendants was wrongful both in respect of the interference with existing contracts and in respect of the prevention of contracts being entered into in the future. I cannot doubt that there was evidence from which the jury might find that people were prevented from dealing with the plaintiff by the resolution of the joint committee and the action taken by the defendants, and that the plaintiff was thereby injured, and it appears to me that the jury have so found. For these reasons I think this application must be refused.

LOPES, L.J. I do not propose to go through the facts or the evidence which have been so fully dealt with by the Master of the Rolls, and with which I understand A. L. Smith, L.J., proposes to deal. I propose to confine myself to a statement of what I believe to be the law applicable to the case. The case which I think must govern our decision as to the first head of claim is *Bowen* v. *Hall* (1), which I understand to lay down the broad principle that a person who induces a party to a contract to break it, intending thereby to injure another person or to get a benefit for himself, commits an actionable wrong. That appears to me to be the effect of the decision in that case, which was decided in 1881, and never appears to have been since questioned. I presume that the principle is this, viz., that the contract confers certain rights on the person with whom it is made, and not only binds the parties to it by the obligation entered into, but also imposes on all the world the duty of respecting that contractual obligation. That being the law on the subject, the jury found that the defendants did maliciously induce persons who had contracted with the plaintiff to break

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(1) 6 Q. B. D. 333.

their contracts. It seems to me that there was abundant evidence to support that finding. It was contended that the damage to the plaintiff must be considered as having arisen from the spontaneous action of the individual workmen themselves. I cannot think that that view is maintainable. We know something of the action of trade unions and their officials. So far from the injury to the plaintiff arising from the men acting of their own accord, I think it is clear that, if it had not been for the fear of the trade unions and of the consequences of breaking the compacts which they had entered into as members of the union, there would have been no question of the men withdrawing from their employ. I think it was shewn that Russell acted in what he did as the delegate, and under the instructions of the joint committee of the three trade unions, of which the other defendants were members: and, therefore, I think that the other defendants occupy the same position as he does.

The second question in the case is with regard to inducing persons not to enter into contracts with the plaintiff. The question left to the jury as to that was, whether the defendants maliciously conspired to induce persons not to enter into contracts with the plaintiff, and such persons were thereby induced not to make such contracts. The jury answered that question in the affirmative. That being so, the question is whether, upon that finding, it is shewn that the defendants committed an actionable wrong. I think that it is. I will state shortly what I believe to be the law on the subject. The result of the authorities appears to me to be that a combination by two or more persons to induce others not to deal with a particular individual, or enter into contracts with him, if done with the intention of injuring him, is an actionable wrong if damage results to him therefrom. That appears to me to follow from what was said in *Gregory* v. *Duke of Brunswick* (1), and in the House of Lords in the case of *Mogul Steamship Co.* v. *Macgregor, Gow & Co.* (2) It was argued here that there was no evidence that any persons were induced not to enter into contracts with the plaintiff. I cannot agree with that contention. I think there was sufficient evidence to that effect, and that injury was thereby occasioned to the

(1) 6 M. & G. 953. (2) [1892] A. C. 25.

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plaintiff. For these reasons, I think that the verdict ought to stand, and this application should be dismissed.

A. L. SMITH, L.J. The plaintiff in this case is a master mason and builder at Hull, who in the course of his business supplies building materials by contract to other persons. He sues the defendants, who are members of a joint committee of the Operative Bricklayers', of the Operative Plasterers', and of the Operative Labourers' Societies in that town, firstly, for having unlawfully and maliciously procured certain persons to break their contracts with him; and, secondly, for having maliciously conspired to induce certain persons not to enter into contracts with him, by reason of which acts he was damnified. The jury have found against the defendants upon each of those alleged causes of action, and have awarded 50*l.* damages upon the first and 200*l.* damages upon the second. A motion has been made to us to set aside the verdict, and to enter it for the defendants, upon the ground that there was no evidence to fix any of the defendants with liability for the acts complained of, and that the learned judge at the trial misdirected the jury in point of law. The question he left to the jury as to the first alleged cause of action was, whether the defendants or any of them maliciously induced the persons named to break their contracts with the plaintiff; and he fully explained what was the meaning of the word "maliciously" in this question. He said: "Now, in my judgment, it is perfectly clear law, that to induce a person who has made a contract with another to break that contract, in order to hurt the person with whom it has been made, to hamper him in his trade, or to put undue pressure upon him, or to procure some indirect advantage for the person himself—to induce another to break a contract for any of those motives—is in point of law to do it maliciously; therefore, if in this particular case you are of opinion that the plaintiff has satisfied you that any one of the defendants had induced—I will take one particular instance—Brentano, because he comes first, to break his contract with the plaintiff, of the existence of which he was aware, in order to hurt the plaintiff in his trade, ... and, if his object in doing that was, by hurting him in his

trade, to compel him to do something which he did not want to do, ... that would be 'maliciously' in point of law, and a cause of action would be established."

Nothing could be clearer than this direction, and that it is correct in point of law will be seen upon examining the opinion delivered by Crompton, Wightman, and Erle, JJ., in *Lumley* v. *Gye* (1) and the judgment of this Court (Lord Selborne, L.C., and Brett, L.J., Lord Coleridge, C.J., dissenting) in *Bowen* v. *Hall*. (2) It is not necessary, in my opinion, in this case to decide the point whether this cause of action will apply, if there is no contract in existence, and I reserve that point for decision hereafter.

But it is said that there was no evidence to support the cause of action in the present case. Now evidence was given in support of the following facts.

[The Lord Justice here stated the effect of the material portions of the evidence in detail, so far as it bore upon the dealings of the defendants with Brentano, and then proceeded as follows:—]

It was argued for the defendants that the above constituted no evidence that the defendants (who were all members of the joint committee of the three societies, which Russell admitted he represented) had, with knowledge of the existence of any contract, and with the intention of injuring the plaintiff and of crippling him in his trade, induced Brentano to break his contract with him; and it was said that all that the defendants had done was what was done in every strike, i.e., call out the men, and that this was legal. If this had been all, I should have agreed, for it cannot be doubted that, at any rate since the passing of 38 & 39 Vict. c. 86, in 1875, if not from 1871, strikes per se, subject to the exceptions mentioned in ss. 4 and 5 of that Act, are legal.

It was argued that, if the defendants were to be held liable in damages in this case, no trade union could hereafter call out their men, for it might be held that by so doing they were inducing the breach of a contract to the injury of one of the contracting parties, if there happened to be one. I do not agree that a strike is analogous to the present case; for, to maintain the cause of action sued on, there must be evidence that the

(1) 2 E. & B. 216. (2) 6 Q. B. D. 333.

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defendant, with knowledge of the existence of a contract, had induced and succeeded in inducing one of the contracting parties to break his contract to the injury of the other contracting party, and there must also be evidence that the intention of the inducer was by such breach to do harm to the other contracting party, or, to use Lord Hannen's words in *Mogul Steamship Co.* v. *Macgregor, Gow & Co.* (1), that the "real object was to injure the individual." The present is a very different case to that suggested, viz., the merely calling out men on strike, though it does appear to me that, if a strike were used for the purpose and with the intent above mentioned, an action would lie.

In my judgment there is evidence in this case: (1.) That the defendants intended to coerce the builders, Myers & Temperton, to obey their edicts, and, to bring this about, they determined to cut off from them the supply of all materials they might require for their trade, and also the supply of men. (2.) That, inasmuch as the plaintiff would not fall in with their commands, the defendants then determined to cripple and injure him in his trade by inducing Brentano (together with others who were under contract with the plaintiff) to break the contract which they well knew he had with the plaintiff, so that by those means he might be coerced into obedience. It will be remembered that the defendants Russell and Stephenson in their answer to interrogatories stated that the plaintiff had broken no rules. (3.) That the defendants did induce Brentano to break his contract to the loss and injury of the plaintiff. It was, however, insisted that there was no evidence that the defendants knew that Brentano was under contract with the plaintiff; but I do not think that this can be maintained, having regard to the facts that, at the meeting of the joint committee on or about September 11, 1892, the defendant Russell introduced Brentano to the meeting as having a contract with the plaintiff, that the minutes of the meeting of September 19 state that Brentano attended to give evidence with regard to a contract made between himself and the plaintiff, and that the defendant Russell in his letter to Goode stated that Brentano had signed a contract with a firm who were in a dispute with the building trade, i.e., the plaintiff, and gave the Brick-

(1) [1892] A. C. 25, at p. 60.

layers' Society's guarantee to Goode, who was the person they had found to supply materials to Brentano in the place of the plaintiff under his contract with him, Brentano having been induced, or rather forced, to break his contract with the plaintiff. As before pointed out, there was ample evidence that Russell was deputed by the defendants to carry out, if he could, their common intent. In my judgment, not only was there good evidence against the defendants upon this case of Brentano, but I go further, and say that, if the jury had found for the defendants upon this, they would have been wrong. I do not propose to discuss the evidence at length as to the other contractors, who, the jury have found, had been induced to break their contracts with the plaintiff by the action of the defendants; I will only call attention to the evidence of Gibson, whose contract with the plaintiff, it will be noticed, was produced at the meeting of September 19, at which all the defendants were present. He stated that, at the interview which he had with Russell, the latter said that they meant to bring Temperton to his knees before they had done with him, and he would do no good till he had made his peace with them. This expression was very significant as to what the real intentions of the defendants were towards the plaintiff. Upon the first cause of action, in my judgment it is impossible to hold that there was not evidence to support the verdict of the jury.

As regards the second cause of action, i.e. the count for conspiracy, I agree with what has been said by the other members of the Court. I think that the direction of the learned judge on that head was correct, as being in accordance with what was said in *Bowen* v. *Hall* (1) and *Mogul Steamship Co.* v. *Macgregor, Gow & Co.* (2), and that there was evidence to support the verdict of the jury.

Application dismissed.

Solicitors for plaintiff: *Bell, Brodrick, & Gray, for J. T. & H. Woodhouse, Hull.*

Solicitors for defendants: *Shaen, Roscoe, Massey & Co.; Collyer-Bristow, Russell, & Hill, for Laverack & Son, Hull.*

(1) 6 Q. B. D. 333. (2) [1892] A. C. 25.

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April 22, 25.

[IN THE COURT OF APPEAL.]

DOUGAL *v.* McCARTHY.

Landlord and Tenant—Tenant holding over after Expiration of Term—Tenancy from Year to Year—Implication of Law.

Premises were let under an agreement in writing for a year from February 1, 1891, at a rent of 140*l.*, payable quarterly in advance on February 14, May 14, August 14, and November 14. After the expiration of the lease, the tenants remaining in possession, the landlord wrote to them on February 25, 1892, demanding 35*l.* for a quarter's rent due in advance. The tenants did not answer his letter, but remained in possession, and on March 26 they wrote to him to the effect that it was "their intention to discontinue their present tenancy, and that they gave him notice that they would not continue the same beyond the period required under their agreement, but that they would be glad if he could see his way to take up the premises on May 14, or even earlier":—

Held, that, under the circumstances above mentioned, both parties must be taken to have consented to a continuance of the tenancy after the expiration of the lease, and, that being so, the implication was, in the absence of any evidence to rebut it, that there was a tenancy from year to year on the terms of the former lease so far as not inconsistent with such tenancy.

APPEAL from the judgment of Hawkins, J., at the trial without a jury.

The action was for two quarters' rent of premises alleged to be in arrear.

The facts were, so far as material, as follows:—

By an agreement made in February, 1891, between the plaintiff (thereinafter referred to as "the landlord") of the one part, and certain persons, directors of the National Press Association, Limited, of whom the defendant was one (thereinafter referred to as "the tenants") of the other part, the landlord agreed to let, and the tenants for themselves and their assigns, and as a separate and personal agreement each of them for himself and his assigns, agreed to take, certain rooms at No. 62, Strand, for one year commencing on February 1, 1891, at the rent of 140*l.*, payable by four equal quarterly payments in advance on February 14, May 14, August 14, and November 14. The tenants entered and occupied the premises under such agreement. After the expiration of the year ending February 1, 1892, they remained in possession of the premises.

On February 25, the plaintiff wrote to the secretary of the National Press Association, asking for a cheque for 35*l.* for a quarter's rent due on the 1st instant. No answer was sent to that letter, and the tenants remained in possession. On March 26 the secretary wrote to the plaintiff: "I am instructed by Messrs. McCarthy and" (mentioning the names of the other tenants) "to inform you that it is their intention to discontinue their present tenancy of the offices at 62, Strand, London, at present occupied by them for the purposes of this company, and I am directed to give you notice that they will not continue same beyond the period required under their agreement. I shall of course be glad if you can see your way to take up the premises on May 14, or even earlier. We shall of course give you every facility for the securing of a new tenant, and I am sure you will meet us in the same spirit." In answer to this letter the plaintiff's solicitors wrote on March 31 as follows: "Mr. Dougal has handed us your letter, giving notice to give up No. 62, Strand, London, which notice will expire on February 1, 1893. Our client will be ready to meet you, if you have an assignee of the premises, or will be happy to consider a surrender of the present term, if other suitable terms are submitted. We are instructed to ask you to be good enough to pay us the quarter's rent due February 1, and shall be obliged by a remittance at your early convenience."

No answer was sent to this letter. On May 23 the action was commenced. The learned judge was of opinion that the facts did not shew that there had been an agreement for a tenancy from year to year after February 1, 1892. He therefore gave judgment for the defendant. (1)

J. E. Bankes, for the plaintiff. The authorities shew that a holding over by consent of both parties without more constitutes a tenancy from year to year on the terms of the old lease so far as not inconsistent with such tenancy: *Right* v. *Darby* (2);

(1) It will be observed that there was no claim as for use and occupation. The defendant was willing to pay as for use and occupation up to May 14; but the plaintiff's contention was that a tenancy from year to year had been created on the terms of the old lease, and he claimed for rent accordingly.

(2) 1 T. R. 159.

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DOUGAL v. MCCARTHY.

Doe d. *Rigge* v. *Bell* (1); *Digby* v. *Atkinson* (2); *Bishop* v. *Howard*. (3)

The term for payment of rent in advance is not inconsistent with a tenancy from year to year: *Lee* v. *Smith*. (4) The proper inference from what took place here is that the parties agreed to a fresh tenancy from year to year on the terms of the previous tenancy so far as applicable. The landlord by his letter of February 25 treated the tenants as tenants at the same rent payable at the same time as under the original tenancy. The tenants made no objection, but remained in possession for a month after that letter. They must be taken, therefore, to have agreed to be tenants, and the only possible inference as to the terms of such tenancy is that contended for by the plaintiff. There was nothing in the letter of March 26 inconsistent with such inference. On the contrary, that letter confirms it.

[He also cited *Waring* v. *King* (5); *Hyatt* v. *Griffiths*. (6)]

J. W. McCarthy, for the defendant. It is a question of fact, when a tenant holds over, whether there has been an agreement for a new tenancy, and if so on what terms. There must be some act done beyond the mere fact of holding over from which such an agreement can be inferred, such as the payment of rent: *Braythwayte* v. *Hitchcock*. (7) The learned judge in this case found that there was not in fact an agreement by which the defendant and the others became tenants at the same rent as under the old agreement. The mere fact of the tenants remaining in by consent only shewed a tenancy at will. The decision in *Right* v. *Darby* (8) really only dealt with the question what the proper period of notice is in the case of a tenancy from year to year, and had nothing to do with this question. The letter of February 25 was only an offer of a tenancy. The letter of March 26 was inconsistent with the notion that the tenants accepted it or assented to a tenancy from year to year.

(1) 5 T. R. 471; 2 Sm. L. C. 5th ed. p. 93.
(2) 4 Camp. 275.
(3) 2 B. & C. 100.
(4) 9 Ex. 662.
(5) 8 M. & W. 571.
(6) 17 Q. B. 505.
(7) 10 M. & W. 494.
(8) 1 T. R. 159.

[He cited *Doe* v. *Wood* (1); *Oakley* v. *Monck* (2); *Jones* v. *Shears* (3); *Doe* v. *Stennett* (4).]

J. E. Bankes, in reply. There is nothing in any of the cases to the contrary of what Lord Mansfield said in *Right* v. *Darby*. (5) If there be, as he said, a presumption that a holding over after the expiration of a lease by consent of both parties creates a tenancy from year to year, there is nothing here to rebut that presumption. There is no authority for the proposition that such a holding over creates a tenancy at will. The terms of the letter of March 26 imply that there was a tenancy from year to year, for it is an appeal ad misericordiam to allow the tenancy to be terminated as early as possible, which is quite inconsistent with its being a tenancy at will.

LORD ESHER, M.R. I cannot agree with the decision of the learned judge. There seems to be no dispute as to the facts of this case. The defendant and others became tenants to the plaintiff of certain premises for a year ending February 1, 1892, under an agreement, which contained certain terms, amongst others, as to the amount and the time of payment of rent. The year came to an end, and the tenancy under the agreement accordingly expired by effluxion of time. The tenants, however, remained in possession of the premises. The evidence appears to me clearly to shew that the landlord consented to their so remaining in possession as tenants; and that he treated them as tenants from year to year on the terms of the previous tenancy, i.e., at the same rent payable at the same periods as before; for on February 25, he wrote to them demanding a quarter's rent on that footing. After that letter they still remained in possession, and on March 26 they wrote him a letter, the effect of which I will deal with presently. I take it that the doctrine laid down by Lord Mansfield in *Right* v. *Darby* (5) is correct. He there said: "If there be a lease for a year, and, by consent of both parties, the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed

(1) 14 M. & W. 682.
(2) Law Rep. 1 Ex. 159.
(3) 4 A. & E. 832.
(4) 2 Esp. 716.
(5) 1 T. R. 159.

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to have renewed the old agreement, which was to hold for a year." Here there is the landlord's consent, and the fact that the tenants remained in possession after the letter written by him. I take it that it would be a question for a jury in such a case, whether there was the consent of both parties that the tenant should remain in possession after the termination of the expired tenancy. If the tenant under such circumstances remained in possession without saying anything, I should say that a jury ought to conclude that he consented to continue in possession as tenant. If the tenant remained in possession, but made some statement inconsistent with his remaining as tenant—for instance, if he said that the property belonged to him, or if he defied the landlord to do his worst, and said that he would not go out till he was turned out—in that case I should think the jury would say that he did not consent to remain in as tenant, and was a mere trespasser. I do not think that it is necessary, for the purposes of this case, to determine the question whether, if the tenant, though consenting to remain as tenant, nevertheless made some stipulation inconsistent with the notion that he was remaining in possession as tenant from year to year on the terms of the old lease, that inconsistency would justify the jury in saying that that which would otherwise be the implication of law was done away with. But, if after the expiration of a lease the jury find that by consent of both parties the tenant remained in possession as tenant, and nothing was said inconsistent therewith, the implication of law mentioned by Lord Mansfield arises, viz., that there is a tenancy from year to year on the terms of the old lease so far as they are consistent with such a tenancy. Buller, J., in *Right* v. *Darby* (1), in effect laid down the law in the same way as Lord Mansfield. He said: "It is taken for granted by the counsel for the plaintiff that the rule of law, which construes what was formerly a tenancy at will of lands into a tenancy from year to year, does not apply to the case of houses; but there is no ground for that distinction. The reason of it is that the agreement is a letting for a year at an annual rent; then, if the parties consent to go on after that time, it is a letting from year to year."

Therefore, if there is the consent of both parties that the

(1) 1 T. R. 159.

tenant shall remain in possession as tenant, and nothing is said to rebut that inference of law, it is by law a tenancy from year to year on the terms of the old tenancy, so far as applicable. Here there was evidence to shew that the landlord consented to the tenants remaining in possession, and that the tenants also consented to remain in possession, as tenants. I should have said that the mere fact of their holding over as they did was evidence on which a jury ought to infer that they agreed to remain in possession as tenants, for I do not think the jury ought to infer that they intended to remain in possession as trespassers. But in this case the evidence goes further. In the letter of March 26, the tenants' secretary says that it is their intention "to discontinue their present tenancy." The original tenancy was over, so that this language could only refer to a fresh tenancy. Then he says that he is instructed to give notice that they will not continue the same beyond the period required under their agreement, and proceeds: "I shall of course be glad if you can see your way to take up the premises on May 14, or even earlier." What do the expressions so used mean? They seem to me to admit that, if they have assented to a tenancy, such tenancy is in law a tenancy from year to year, and to give notice to determine such tenancy at such period as it may be determinable by law, but to request the landlord, if he can see his way to it, to take the premises off their hands sooner. Such language is quite inconsistent with the notion that they had a right to put an end to the tenancy when they pleased, and therefore that it was a tenancy at will. Therefore, so far from this letter being inconsistent with the implication of law that they had consented to remain in possession as tenants from year to year, it seems to me clearly to admit that such was the case.

I think that the proper inference from the facts is that they consented to remain tenants, and did not attempt to impose any term inconsistent with the tenancy which the law would imply from such consent, viz., a tenancy from year to year on the terms of the old tenancy so far as consistent with a tenancy from year to year. I think the term for payment of rent in advance was not inconsistent with such a tenancy, and therefore I think that the plaintiff was entitled to recover the rent which he

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claimed. For these reasons I think that this appeal should be allowed.

LOPES, L.J. I am of the same opinion. I think this case is governed by what Lord Mansfield said in *Right* v. *Darby* (1), viz.: "If there be a lease for a year, and, by consent of both parties, the tenant continue in possession afterwards, the law implies a tacit renovation of the contract." I will deal first with the case where there is merely a holding over by the tenant after the expiration of a tenancy for a year by consent of both parties, and nothing is said in reference to any terms of tenancy either by the landlord or the tenant. I think the proper direction to a jury in such a case would be that, there being such holding over, and nothing being said by either party as to terms, it follows from such holding over by implication of law that there is to be a tenancy from year to year on the same terms as those of the lease which has expired, so far as they are not inconsistent with such a tenancy: that they are bound, to use Lord Mansfield's words, to imply a renovation of the old agreement. I will now proceed to deal with the case where, after the expiration of the term, letters have passed or conversation has taken place between the parties, as in the present case. In such a state of things it will be a question for a jury whether there has been a consent by both parties to a continuance of the tenancy, and if so on what terms. In the present case there is clear evidence of the consent of both parties to the continuance of the tenancy. The landlord's letter of February 25 is clearly a consent by him to such continuance. The tenants remained in possession after that letter. If the case stopped there, and there had been no subsequent letter written by the tenants, I should have thought that the implication spoken of by Lord Mansfield would have arisen. But then we have the letter of March 26. If that letter were capable of such a construction as to lead to the conclusion that that implication was rebutted, then I should have thought that it would be a question for a jury whether that was so or not. But does that letter in any way negative the implication arising from the previous transactions? I think not. So far

(1) 1 T. R. 159.

from negativing such implication, in my opinion it tends to confirm it. It contains expressions which indicate that the tenants did not suppose that they had a right to bring the tenancy to an end on May 14, and that they therefore appealed to the landlord to permit them to bring it to a termination then or earlier, if he could see his way to doing so. It appears to me that Hawkins, J., did not put the right construction on this letter. For these reasons, I think that the proper conclusion from the facts was that there had been a renovation of the former tenancy on such of its terms as were not inconsistent with a tenancy from year to year, and therefore this appeal should be allowed.

A. L. SMITH, L.J. The learned judge at the trial held that there was no evidence against the defendant that he became tenant from year to year of these premises after the expiration of the original tenancy for a year. The question whether he was right in so holding depends on what the law is with reference to cases where a tenancy has expired, and the tenant holds over with the consent of his landlord. I understand it to be this. If the landlord consents to such holding over by the tenant, and the tenant consents to remain in possession as tenant, then the implication of law is, unless there is evidence to rebut it, that the tenant holds over as tenant from year to year on the terms of the old tenancy so far as they are not inconsistent with a tenancy from year to year. In the present case there is a direct statement by the landlord to the tenants that he consents to their holding over, because on February 25, three weeks after the expiration of the old tenancy, he writes asking for a quarter's rent as on a fresh tenancy. For a whole month the tenants do nothing, but hold over with notice that the landlord is demanding rent from them as tenants on the terms of the agreement which expired on February 1. Speaking for myself, I should say that the proper inference from that was that the tenants consented to hold over on the terms of the old agreement. It was laid down in *Right* v. *Darby* (1), that in such case the implication of law is that there is a tenancy from year to year on

(1) 1 T. R. 159.

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the terms of the old tenancy, so far as consistent with such tenancy from year to year. I think that possibly that implication might be negatived by evidence; but in the present case, so far from that being so, the letter of March 26 appears to me clearly to assist and support it. For these reasons, I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff: *Burch, Whitehead, & Davidsons.*
Solicitors for defendant: *Kime & Hammond.*

E. L.

C. A. 1893 *May* 1.

[IN THE COURT OF APPEAL.]

DRIVER *v.* BROAD.

Frauds, Statute of—Contract for Interest in Land—Debentures—Company—Assignment—"Floating Security."

A company incorporated under the Companies Act, 1862, issued debentures charging its undertaking and all its property whatsoever and wheresoever, both present and future. The debentures contained the following conditions: that the charge thereby created should be a floating security, and the company, until the appointment of a receiver or the commencement of a winding-up, should be at liberty, in the ordinary course of its business, to dispose of the property charged; and that, in the event of the company making default in payment of the principal or interest secured by the debentures, or in the event of the winding-up of the company, the debenture-holders might appoint a receiver, who should have power to sell the mortgaged property. A holder of certain of such debentures orally contracted for the sale and transfer of them to a purchaser. At the dates both of the issue of the debentures and of such contract, the company was possessed of certain leasehold property:—

Held, affirming the judgment of Mathew, J., that the contract for the sale of the debentures was a contract for an interest in land within the 4th section of the Statute of Frauds.

APPEAL from judgment of Mathew, J., on further consideration. (1) The facts were as follows:—

A company registered under the Companies Act, 1862, and called Broad's Patent Night Light Company, Limited, in March, 1890, issued certain mortgage debentures, whereby it charged with the payment of the principal money and interest therein contracted to be paid, "its undertaking and all its property

(1) Ante, p. 539.

whatsoever and wheresoever, both present and future, including its uncalled capital for the time being." The debentures were issued subject to conditions indorsed thereon, of which the material portions were as follows:—

"1. The charge hereby created shall be a floating security, and accordingly the company, until the appointment of a receiver under the provisions herein contained, or the commencement of a winding-up, shall be at liberty, but only in the ordinary course of its business, to sell, deal with, and dispose of the property charged, and to give receipts for money, and divide its profits, as if none of the said debentures had been issued."

"13. The principal moneys hereby secured shall become payable in each of the following cases . . . . (c) if the company creates any specific charge on any of its freehold or leasehold property in priority to the debentures."

"14. The following provisions as to the appointment and powers of a receiver shall have effect, that is to say: (1.) The registered holders of one half in value of the outstanding debentures of this issue may, by writing, appoint some person approved by them or him to be receiver, or a receiver and manager, of the property charged by the debentures; and such appointment may be made when the company has made default for more than two calendar months in the payment of any principal moneys or interest hereby secured, or when any order has been made, or effective resolution has been passed, for the winding up of the company; and s. 24 of the Conveyancing Act, 1881, shall be regarded as modified accordingly. (2.) The receiver shall have power to sell the mortgaged property, and the provisions of the said Act as to sales by a mortgagee shall be applicable."

In December, 1891, the plaintiff, being the holder of twenty of the above-mentioned debentures, entered into an oral contract with the defendant for the sale and transfer of such debentures to him at an agreed price.

At the dates, both of the issue of the debentures and of the contract of sale of them to the defendant, the company was possessed of certain leasehold property, consisting of a factory and warehouses where its business was carried on. The defendant

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subsequently refused to accept the transfer of the debentures or to pay the price. To an action for the breach of such contract, the defendant pleaded that the contract was a contract for an interest in land within s. 4 of the Statute of Frauds, and ought to have been in writing.

The learned judge held that to be so, and therefore gave judgment for the defendant.

Morten, for the plaintiff. These debentures did not create an interest in land within the meaning of the 4th section of the Statute of Frauds, and therefore the contract for sale of them was not within that section. The security is to be a "floating security," that is to say, it is not to charge in the present any defined property, but is only to be enforceable in future in certain specified events against the assets of the company for the time being by means of the appointment of a receiver. The scope of the debentures is not to create a present interest in land, but merely to charge the undertaking, unless and until certain events happen, in which case a receiver may be appointed, who may sell the assets of the undertaking. The individual debenture-holder is not in the position of a mortgagee. The charge does not attach until the specified events happen. Till then the whole property and interest in the land remain in the company, who can dispose of it in the ordinary course of business without the consent of the debenture-holders. In the case of *Toppin* v. *Lomas* (1), relied upon by Mathew, J., the ground of the decision was that the obligee of the bond stood in the position of a mortgagee. It is not contested that, when that is the case, there is an interest in land within the Statute of Frauds. But that is not the case here. [He also cited *Myers* v. *Perigal*. (2)]

A. T. Lawrence, and *J. G. Wood*, for the defendant, were not called upon.

LORD ESHER, M.R. The question is whether these debentures create a charge on land, and consequently a contract for the sale of them is within the 4th section of the Statute of Frauds.

(1) 16 C. B. 145. (2) 2 D. M. & G. 599.

It has been argued that they do not create such a charge. By the debenture the company purports to charge "its undertaking and all its property whatsoever and wheresoever." A portion of the property of the company consisted of land and buildings. How it can be maintained that that property does not come within the words "all its property whatsoever and wheresoever," I fail to see. Again, in the conditions indorsed on the debentures, it is provided that the principal moneys shall become payable "if the company creates any specific charge on any of its freehold or leasehold property in priority to the debentures," a provision which seems plainly to imply that the debentures charge such freehold or leasehold property. It seems to me perfectly clear that these debentures constitute a charge on the company's land and buildings, and the contract is therefore within the Statute of Frauds, as concerning an interest in land. It was argued that that was not so, because the charge was expressed to be a "floating security." The meaning of that expression appears to be that, notwithstanding the charge, the company is to have power to sell the property charged under certain circumstances, and so the charge may be defeated; but there is none the less a charge on the land, subject to the power given to the company to dispose of the property in the ordinary course of its business. The Court of Appeal appears to have held, in *In re Florence Land, &c., Co., Ex parte Moor* (1), that such a charge effectually charges the real estate of the company. For these reasons, I think that the appeal must be dismissed.

LOPES, L.J. The question in this case is whether it was necessary that this contract should be in writing by reason of the provisions of the Statute of Frauds. That depends on whether it was a contract which dealt with "lands, tenements, or hereditaments, or any interest in or concerning them." It dealt with debentures; and the argument was that debentures such as these do not create an interest in land. When we look at the form of the debentures, we find in it the statement that there is to be a charge on the company's "undertaking, and all

(1) 10 Ch. D. 530.

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its property whatsoever and wheresoever." It is admitted that the company had land and buildings. That being so, it seems to me clear that those words must create an interest in land. Moreover, in condition 13 we find the words, "If the company creates any specific charge on any of its freehold or leasehold property in priority to the debentures." Those words also appear to me clearly to shew that there was a charge on the land. It was said by the plaintiff's counsel that this was expressed to be a "floating security," and, admitting that, if there had been a debenture amounting to a mortgage, the case would have been within the Statute of Frauds, he nevertheless contended that the charge here given being a floating security it was otherwise. I cannot follow that argument. The definition of such a security given by James, L.J., in *In re Florence Land, &c., Co., Ex parte Moor* (1), and adopted by Pearson, J., in *In re Horne & Hellard* (2), was that it was a "charge upon the assets for the time being." I cannot see that the fact that this was what is called a floating security makes any difference. I am of opinion, therefore, that the contract in this case was within the 4th section of the Statute of Frauds, and that the appeal must be dismissed.

KAY, L.J. I am of the same opinion. The debentures in this case are in a form which is now familiar. They purport to give a charge, not only on the undertaking of the company, as was the case in *Gardner* v. *London, Chatham and Dover Ry. Co.* (3), but also on all the property of the company whatsoever and wheresoever both present and future. There can be no doubt that, in favour of a person advancing money upon them, these debentures would at once give a charge in equity upon all the property which the company then had, and probably they would give a charge upon all the property it might afterwards acquire. It was urged that this was a "floating" security. That term only expresses what is more fully expressed in the conditions indorsed on the debentures, viz., that the company shall, notwithstanding the debentures, be at liberty to carry on its business, and in the ordinary course of such business to dispose of the property, as if the debentures did

(1) 10 Ch. D. 530. (2) 29 Ch. D. 736.
(3) Law Rep. 2 Ch. 201.

not exist. That is the ordinary meaning of the term "floating security." It does not mean that there is not to be a charge, and an immediate charge, on the property, but merely that, notwithstanding the existence of the charge on all the property, including the real property, of the company, power is reserved to dispose of the property if in the ordinary course of carrying on the company's business it becomes necessary to do so. The charge is none the less a charge because such a power is reserved. In the case of *In re Florence Land, &c., Co., Ex parte Moor* (1), already referred to by the Master of the Rolls, I observe that Jessel, M.R., said, with regard to this kind of security, that it was intended to be "a security on the property of the company as a going concern, subject to the powers of the directors to dispose of the property of the company while carrying on its business in the ordinary course." I have no doubt that these debentures did create an immediate charge on the land and buildings, which the company had when they were given, and therefore did create an interest in land. Consequently, any contract disposing of that interest must be within the Statute of Frauds.

Appeal dismissed.

Solicitor for plaintiff: *J. White.*
Solicitors for defendant: *Faithfull & Owen.*

(1) 10 Ch. D. 530.

E. L.

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1893
April 27.

[IN THE COURT OF APPEAL.]

HAMLYN *v.* THE CROWN ACCIDENTAL INSURANCE COMPANY, LIMITED.

Insurance—Accident—"Injury caused by external means."

The plaintiff effected an insurance with the defendants against "any bodily injury caused by violent, accidental, external, and visible means." The policy contained a proviso, excepting, among other things, injuries arising from "natural disease or weakness, or exhaustion consequent upon disease." In stooping to pick up a marble dropped by a child, the plaintiff dislocated the cartilage of his knee. Before the accident, the plaintiff had not suffered from any weakness of the knee or knee-joint. In an action to recover compensation under the policy:—

Held, that the word "external" must be taken in contradistinction to the internal causes of injury, such as disease, mentioned in the proviso, and that, so reading the policy, the injury was caused by external means; that it was also caused by means that were violent, accidental and visible, and was covered by the policy.

APPLICATION of the defendants for judgment or a new trial, in an action tried before Lawrance, J., with a jury.

The action was brought on an award made in pursuance of one of the conditions of a policy, effected by the plaintiff with the defendant company, to secure compensation in case the insured sustained, during the continuance of the policy, "any bodily injury caused by violent, accidental, external, and visible means." The policy contained, among others, the following proviso: "Provided always, that this policy shall not extend to, nor cover, the death or injury of the insured by suicide, or attempted suicide, whether felonious or not, or caused by his being in a state of intoxication, or while under the influence of intoxicating liquors, or drugs, or fits, or insanity, or by duelling, fighting, or by any breach of the law on the part of the insured; or by war, or invasion, foreign enemy, civil commotion, popular riot, or by any military or usurped power; or by travelling in any railway carriage other than those provided for the conveyance of passengers, or entering or leaving a carriage whilst the train is in motion, or by the insured committing a breach of any of the by-laws of a railway company or tramway company; or

riding races of any kind or steeple-chasing, or otherwise wilfully, wantonly, or negligently exposing himself to any unnecessary danger; or arising from natural disease or weakness, or exhaustion consequent upon disease, or any surgical operation rendered necessary thereby, or arising from such disease, weakness, exhaustion, or surgical operation, although accelerated by accident."

The plaintiff was a tradesman carrying on business at Penzance. He was standing by the counter in his shop, the floor of which sloped away from where he was standing. A customer came into the shop with a child, and the child dropped a marble, which the plaintiff stooped forward to pick up as it rolled from him.

His evidence was, that he was standing with his legs together and separated his knees and leaned forward, and made a grab to get at the marble; that in doing so he wrenched his knee and could not get it straight again. The plaintiff was disabled for nine weeks. He had not previously suffered from any weakness in the knee or knee-joint. The injury from which he suffered was described as a dislocation of the internal cartilage of the knee-joint.

The question of the liability of the company to pay compensation was referred, under the conditions of the policy, and the arbitrator awarded the plaintiff 60*l.* and the costs of the arbitration. The latter were paid into Court, and the learned judge directed a verdict for the plaintiff for the 60*l.*, and gave judgment for that amount beyond the sum paid into Court.

The defendants appealed.

Bompas, Q.C., and *W. Blake Odgers*, for the defendants. In order that the plaintiff may recover the injury must be caused by means that are violent, accidental, external, and visible; that is, the means, and not the result, must be capable of being so described. Taking the four words descriptive of the "means," there must be physical force, unintentional so far as the person injured is concerned, external to him, and capable of being seen. The plaintiff's action in stooping was not violent, for it was not connected with any physical force other than his own; it was

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not accidental, for he did that which he intended to do; there were no external or visible means which caused the accident, though, if he had trodden on the marble and so caused the injury, it might be otherwise.

The proviso does not imply that the exceptions contained in it would otherwise come within the clause, but rather indicates that the clause must exclude some injuries other than those arising from disease, but which might be confounded with the results of disease.

[They cited: *Trew* v. *Railway Passengers' Assurance Co.* (1); *Winspear* v. *Accident Insurance Co., Limited* (2); *Clidero* v. *Scottish Accident Insurance Co.* (3); *Sinclair* v. *Maritime Passengers' Assurance Co.* (4); *Southard* v. *Railway Passengers' Assurance Co.* (5); *Martin* v. *Travellers' Insurance Co.* (6)]

Fraser Macleod, for the plaintiff. The words of the principal clause must be read in opposition to those in the proviso. The proviso deals with disease and inherent weakness, and the external means mentioned in the clause must be put in opposition to this and indicate something not arising internally. There was nothing internal, whether the causes that led to the injury are taken to be the marble and the sloping floor, or the action of the plaintiff in stooping. It is clear that there was something accidental, as the plaintiff did not mean to get into a position in which he might put his knee out. The stooping, as described by the plaintiff, was violent and visible, and all the conditions of the policy are satisfied. The interpretation put by the defendants on the word "means" is too narrow. The expression in the policy is "caused by means," and the inquiry should be whether the "cause" of the injury comes within the descriptive words.

Bompas, Q.C., in reply. The expression "means" should not be altered into something different. What the clause indicates is that the physical reason of the injury should be external. Here the injury was the displacement of the cartilage, and the

(1) 30 L. J. (Ex.) 317; 6 H. & N. 839.
(2) 6 Q. B. D. 42.
(3) Scotch Sess. Cas. 4th Series, vol. xix. 355.
(4) 30 L. J. (Q.B.) 77; 3 E. & E. 478.
(5) 34 Connecticut Rep. 574.
(6) 1 F. & F. 505.

physical reason for that was the pressure of the bones of the knee, and that was internal.

LORD ESHER, M.R. It seems to me that from the course that the case took at the trial, the question now is whether, on the true construction of this policy, the plaintiff's case comes within its terms. We have to arrive at the real bargain between the parties by taking the words of the policy and reading them according to their ordinary sense. Reading the words of the clause, it seems to me to be clear that it must be read thus: "Any bodily injury the result of a violent, accidental, external, and visible cause." I take it that what happened to the plaintiff was that, seeing the marble on the floor of the shop running down the slope, he wanted to stop it, and proceeded to try and catch it. To do that he separated his knees and stooped forward, bending his knees. He seems to have done this awkwardly; at all events, in doing it he wrenched his knee, and that did the mischief, and that wrench was the cause of the injury. That that was accidental I cannot doubt. He did not mean to wrench his knee, and that would not be the ordinary result of such an action. Then, was the cause of the injury something violent? That expression must be construed as meaning the contrary of "without any violence at all," which would not describe what happened. The word "external" is that which has caused me most doubt; but I feel sure that in this policy, looking, as we are bound to, at the rest of the policy, and the things that are excepted from it, the expression must be taken to mean the antithesis of "internal." If the injury had happened by reason of something internal it would not be within the policy; but that is not the case, and I think we must say that because the cause of the injury was not internal it must have been "external," and in that case it was also "visible" within the meaning of the policy.

I think, therefore, that the case is brought within the terms of the policy, and that the plaintiff was entitled to succeed in the action. The appeal must therefore be dismissed.

LOPES, L.J. I am of the same opinion. The policy must be read in the way in which a person of ordinary intelligence would

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LOPES, L.J.

read it, and in construing this particular clause we must not confine our attention to that clause, but must look to the whole of the policy. Now, in the proviso which excepts injuries resulting from the various matters enumerated, I find injuries "arising from natural disease, or weakness, or exhaustion consequent upon disease, or any surgical operation rendered necessary thereby, or arising from such disease, weakness, exhaustion, or surgical operation, although accelerated by accident." I read these words because they appear to me to deal strictly with matters internal to the person who sustains the injury, and in my opinion the words used in the descriptive clause apply to matters different from and contradistinguished from the internal matters dealt with in the proviso. I read the clause as to liability for injuries in this way—that the company insured against "any bodily injury arising from a violent, accidental, external, and visible cause." If that is the proper way to read the clause, let me apply the words to the present case. In stooping to pick up the marble the plaintiff used some extra exertion and some extra physical force, and I think that the expression "violent" is satisfied by the facts which attended the injury. The cause of the injury was accidental in the sense that the injury was a casualty and unforeseen and unexpected. Then comes the word "external," and in construing that word it is important to bear in mind the other part of the policy which deals with matters internal. Looking at the contrast between matters external and matters internal, it is suggested that the resistance of the floor supplies the external cause. I think a more obvious cause is the act of reaching after the marble and the wrench which accompanied that act. That stooping and reaching after the marble was certainly not an internal cause, but was, in my opinion, an external cause within the policy. Once admit that there is an external cause, it is plain that it was a visible one, and that condition also of the policy is satisfied. The plaintiff, therefore, is entitled to verdict and judgment.

A. L. SMITH, L.J. It seems to me that the point now for determination is whether there was any evidence which would support a verdict for the plaintiff on the ground that the

injury he sustained was within the terms of the policy. The policy recites that the plaintiff is anxious to insure against accident. Now, many cases have been cited to shew what is the meaning of some of the words by which this is carried out; but it is important to bear in mind what are the facts of this particular case. The plaintiff described his action in stooping and grabbing at the marble as it rolled on the sloping floor, and I have to ask myself whether the injury, as he describes it, comes within the words "injury caused by violent, accidental, external, and visible means." I do not want to suggest any alteration of the words, though I agree with my Lord and my brother Lopes as to the way in which the policy is to be read. But taking the words as they stand—By what means was the plaintiff injured and his knee put out? There cannot be a question that the means were violent. They were also accidental, for getting into the particular position in which the injury could happen was not done on purpose. Then, were they external? I think the word must be understood as meaning the opposite of internal. The means by which the injury was caused were the stooping on the part of the plaintiff and his grabbing at the marble to pick it up; and I think they may be properly described as external. If so, the last word "visible" applies, for any one looking on could see the stooping of the plaintiff. Under these circumstances the words of the policy are satisfied, and the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Bolton & Co., for Wellington Dale, Penzance.*

Solicitors for defendants: *Burton, Yeates, & Hart, for Trythall & Bodilly, Penzance.*

A. M.

C. A.

1893

March 8.

[IN THE COURT OF APPEAL.]

HORNSEY LOCAL BOARD *v.* DAVIS.

Local Government—Sewers—Vesting in Local Authority—Private Street, Sewer in—Acceptance by Local Authority of incomplete Sewer—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, 15, 150.

The owners of a building estate, who were the predecessors in title of the defendant, deposited plans, which were approved by the local authority, shewing a road running down the slope of a hill and crossing the New River at the foot, with a sewer running the whole length of the road and crossing the New River to join another sewer on the farther side. An agreement was made by the New River Company with the estate owners to divert the New River so as to enable the sewer to be laid across the old bed of the stream. In 1885 the sewer was made as far as the New River, where it stopped, the river not having then been diverted; it had no outfall, and was never, in fact, used as a sewer; but the work was from time to time inspected by a servant of the local authority, who authorized the covering in of the various sections, and made reports to the local authority, who never expressed dissatisfaction with the work. Nothing more was done to the sewer, which became out of repair and ruinous; and in 1890 the local authority gave to the frontagers in the road notice, under s. 150 of the Public Health Act, 1875, to sewer the road down to the New River; on their default the local authority themselves constructed a new sewer, which they carried across the bed of the New River and connected with the sewer on the other side, the diversion of the river having been completed during the execution of the works by the local authority. The local authority having sought to charge the frontagers with the expenses of making the new sewer, the question of the amount to be paid by the defendant was referred to arbitration, and in an action on the award the jury found that the local authority had accepted the old sewer as a satisfactory sewer:—

Held, that the local authority had power to accept the original sewer, although it had no outfall, and was at the time of acceptance incapable of being used as a sewer; and that, the road having once been sewered to the satisfaction of the local authority, the expenses of constructing the new sewer were not chargeable on the frontagers.

Appeal of the plaintiffs from the verdict and judgment at the trial before Mathew, J., and a special jury.

The action was brought upon an award to recover an apportioned amount of the expenses of paving and sewering a new street. The circumstances which gave rise to the action were as follows:—

In the year 1884 the British Land Company, the predecessors in title of the defendant, were the owners of an estate within the

district of the plaintiffs, which they were desirous of laying out for building. A scheme was prepared by them and submitted, together with a plan of the estate, to the plaintiffs, by whom it was approved. The plan shewed a road called Wightman Road, running from the brow of a hill down the slope of the hill to the New River at the foot, and crossing the New River to land belonging to the company on the other side, and it shewed also a sewer running the whole length of Wightman Road, and crossing the New River to join another sewer on the other side. In order to carry out the scheme it was necessary that the New River should be diverted from its course, and an agreement was entered into between the British Land Company and the New River Company, by which the latter undertook to divert the course of the river, carrying it under the hill by a tunnel, thus enabling the sewer to be carried across the old bed of the stream, a portion of which was to become the property of the land company. In the years 1884 and 1885 the estate was laid out, and the sewer along Wightman Road was constructed as far as the New River, and the continuation of the sewer on the farther side was also made; but the diversion of the New River not having been then carried out the sewer could not be taken across the river, and it stopped on arriving at the bank of that river; it had no outfall. The evidence given as to the construction of this sewer shewed that a man in the plaintiffs' employ from time to time inspected the works while in progress, and made suggestions as to the mode of carrying them out, which were adopted; that he authorized the covering in of the various sections of the sewer as they were completed, and that he wrote letters or reports to the plaintiffs as to the progress of the works. The plaintiffs denied that they had ever accepted the sewer or expressed themselves satisfied with it, or that the man sent by them was authorized to do so on their behalf; it was admitted, however, that no complaints as to the way in which the sewer was constructed were made by or on behalf of the plaintiffs. Nothing more was done to the sewer before the year 1890; it never was used as a sewer, and, from want of attention, it became out of repair and ruinous. Between 1885 and 1890 the defendant had bought from the British Land Company a considerable quantity of land adjoining Wightman Road.

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On November 12, 1890, the plaintiffs gave notice to the owners and occupiers of premises fronting or abutting on Wightman Road, including the defendant, that the road was not sewered, levelled, paved, metalled, flagged, channelled, and made good to their satisfaction, and required the owners to execute the works mentioned in the notice; this did not include the work to be done on the bed of the New River. The frontagers did not comply with the notice, and the plaintiffs in 1891 executed the works, the expenses being duly apportioned by their surveyor among the frontagers according to the frontage of their respective premises. The works included the laying down of a new sewer along Wightman Road in place of the old sewer made by the land company; but the tunnel under the hill having been completed by the New River Company in the same year (1891), and the New River diverted, the new sewer was carried across the old bed of the river and connected with the sewer on the farther side, according to the original intention of the land company's scheme. The defendant did not dispute the apportionment of the expenses incurred in executing works other than sewering work, nor did he dispute the proportions in which the expenses of the sewering work were apportioned between himself and the other frontagers, but he wholly disputed the apportionment so far as it included the sewering work. The plaintiffs thereupon appointed a civil engineer as arbitrator on their behalf to settle the amount to be paid by the defendant, and the defendant appointed the same gentleman to act on his behalf in settling the proportion to be paid by him of any of the expenses to which he might be held by a court of competent jurisdiction to be liable to contribute, and also in settling the amount of the expenses duly incurred by the plaintiffs in levelling, paving, metalling, flagging, channelling, and making good the road, and the amount so incurred in sewering the same. Both parties attended before the arbitrator, but the defendant under protest, contending that there was no question in dispute between the plaintiffs and defendant which he had jurisdiction to determine, or in respect of which he had jurisdiction to make any award.

The arbitrator duly made his award, which, so far as is now material, was in the following terms: "I adjudge and award

that some time prior to the date when the sanitary authority served notices upon the frontagers to sewer Wightman Road, a sewer had been constructed by and at the cost of owners of property abutting on the said road, and that during the construction thereof information was from time to time given to the surveyor of the sanitary authority that certain lengths of the sewer were about to be covered up, whereupon a person in the employment of the sanitary authority visited the work, and when occasion required pointed out defects, which were remedied. The person so visiting the work was not authorized by the sanitary authority or by their surveyor to pass or accept or express satisfaction with the sewer. I further find and award that at the date of the service of the before-mentioned notices to the frontagers, the sewer which had been so constructed, having no outfall, had not in fact been used for sewage purposes, and had not been taken over by the sanitary authority, and also that it was then in a defective condition, and that in consequence the said road was not sewered to the satisfaction of the sanitary authority, and that the sanitary authority had reasonable grounds for being so dissatisfied. I further adjudge and award that the sanitary authority had not previously been satisfied that the said section was properly sewered, unless the local authority are held as a matter of law to be so satisfied owing to the attendance of the person employed by them as aforesaid at the times when the said sewer was about to be covered up, and to the absence of any notice of dissatisfaction on the part of the sanitary authority after the completion of the work. If and so far as this is a matter of fact, I find that the sanitary authority never expressed themselves satisfied with the sewer constructed as aforesaid." The award then found in the plaintiffs' favour for the full amount of their claim, and directed payment by the defendant of the balance unpaid by him, and of the plaintiffs' costs of the reference and award, and that he should bear his own costs; but if the Court should be of opinion that the defendant was not liable for the sewering expenses, then the sanitary authority were to pay his costs of the reference and award and bear their own costs. The award further found that the amount apportioned in respect of sewering was 86*l.* 12*s.*

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The defendant refused to pay to the plaintiffs the sum of 86*l.* 12*s.* or the costs of the reference and award, and the plaintiffs brought this action to enforce the award, claiming payment of 86*l.* 12*s.* and interest, and of the taxed costs of the reference and award. At the trial the jury found that the plaintiffs had accepted the original sewer as a satisfactory sewer, and Mathew, J., gave judgment for the defendant. The plaintiffs appealed. (1)

Finlay, Q.C., and *F. Low*, (*Macmorran*, with them), for the plaintiffs. The old sewer having no outfall, and not being capable of being used as a sewer, never vested in the plaintiffs; they had no jurisdiction to accept it before completion. If they could accept it, there was no acceptance in law or in fact. The action of the official who authorized the covering in of the pipes was not in law an acceptance of the sewer by the plaintiffs; the pipes were only approved of as a piece of work, as parts of a sewer to come into existence, and there never was any approval of the sewer as a sewer, for the pipes were not a sewer. The plaintiffs were not in a position to express approval of the work as a sewer until the circumstances changed, and a working sewer was completed. The sewer shewn on the plans which were approved was a sewer going right across the New River, and the sewer which has been carried through as an effective sewer is that made by the plaintiffs, and not the incomplete sewer made by the depositors of the plans.

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 13: "All existing and future sewers within the district of a local authority, together with all buildings, works, materials, and things belonging thereto [with certain specified exceptions], shall vest in and be under the control of such local authority."

By s. 15: "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

Sect. 150 gives power to an urban authority, if a street (not being a highway repairable by the inhabitants at large) is not sewered to their satisfaction, to give notice to the owners or occupiers of premises fronting, adjoining, or abutting on the street, to sewer it; and if such notice is not complied with, the urban authority may execute the works themselves, and recover the expenses from the frontagers in such proportion as may be settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by the Act.

Sects. 179 to 181 provide for the mode of conducting an arbitration under the Act.

The question of whether the plaintiffs accepted this as a satisfactory sewer ought not to have been left to the jury, for it had already been found by the arbitrator in favour of the plaintiffs.

[They referred to *Bonella* v. *Twickenham Local Board.* (1)]

Channell, Q.C. (*Alexander Glen*, and *Jenkin*, with them), for the defendant. The real question was whether the work had been done to the satisfaction of the plaintiffs, for in that case they could not put s. 150 into operation a second time; and that question was properly left to the jury. The notice given in 1890 was in fact simply a notice to do over again what had been done years before, for the New River was still undiverted, and the notice only required the work to be done as far as the channel of the New River; the very giving of such a notice shews that the plaintiffs had power to accept that portion of the work before the scheme was carried through and the sewer completed. The question of acceptance has not been determined by the arbitrator; the effect of his award is to leave that question for determination by the Court. There was an acceptance in fact by the plaintiffs of the work done on the old sewer by the land company.

Finlay, Q.C., in reply.

LORD ESHER, M.R. I am of opinion that this appeal should be dismissed. The defendant is the owner of land bordering on a new street, which the plaintiffs had a right to insist should be sewered, and for which a sewer has been provided. The first fact with which we have to deal is that in 1884 or 1885 a land company was the owner of land which ran down from the brow of a hill to the bed of the New River, and also of land on the other side of the New River. This land the company proposed to lay out for building, with the full knowledge that they would have to submit to the plaintiffs a scheme for the sewering of the land, and that in default of their constructing the sewer themselves, the plaintiffs would construct it, and charge them with the cost. The company prepared a building scheme, which I do not understand to have been confined to their own land, but which at any rate dealt with it, and the plans deposited in

(1) 18 Q. B. D. 577; 20 Q. B. D. 63.

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connection with this scheme shewed a sewer running from the brow of the hill down to the New River. They could not at that time get over the New River, which belonged to the New River Company; but in order to perfect the scheme an agreement was come to with the latter company that the latter should divert the course of the river. It was further agreed that after the diversion of the river the land company were to become the owners of a portion of the old bed of the stream. When they became owners of it the scheme could be completed, the sewer being carried through or over the diverted bed and carried to its termination in the land on the other side. This scheme was submitted to the plaintiffs, and upon the face of it there was this obvious difficulty, that it could not be carried out unless the New River Company kept its contract; it was nevertheless accepted and approved. On that footing the land company dealt with their land and sold a part of it to the defendant, and on that footing the price was regulated.

In 1884 or 1885 works were carried out upon the land, and something was constructed which, whatever may be its strict legal or statutory designation, was in common language a sewer. But when the works had progressed as far as the bed of the New River it was found that the New River Company had not yet carried out their agreement to divert the course of the stream; there was no breach of their agreement, for they were not bound to do the work by that time, but the effect was that the farther progress of the sewer was stopped by the New River; the land company, however, constructed the portion of the sewer which lay on the other side of the New River, and completed the scheme as far as their own land extended. While the work was going on notice was duly sent to the plaintiffs, the local authority, that the work was being carried out, and it cannot be doubted that the plaintiffs authorized a person in their employ to go to the works to see if they were being carried out to their satisfaction. This person must have authorized the covering in of the sewer, and it follows, therefore, that he expressed his approval of the work to the people who were doing it; besides, he made reports from time to time to the surveyor or to the local authority; and if the latter so conducted their business that after

sending a man they did not inquire of him as to how the work was being done, or did not look at his reports, it is their own affair.

After the construction of this sewer matters remained quiet for some four or five years, the obvious reason being that though the property had been laid out people did not at once come forward to build, and it was not necessary therefore to push the New River Company to complete the agreed diversion. During all that time the plaintiffs made no objection to the work that had been done; they simply did nothing, with the consequence that the sewer became in a ruinous condition. Then people began to build, and the plaintiffs woke up, and in 1890 they served a notice on the frontagers requiring them (inter alia) to sewer this street; it was not different work that the plaintiffs required to be done, but the same work over again, and this notwithstanding the fact that at the time the notice was given the New River had not been diverted, but still ran in its old course. They did not tell the owners that they must get the New River diverted, or that they must do the portion of the work on the bed of the river, but they simply told them to do over again the work, with a gap in it, which had been done before. The defendant and the other frontagers did not comply with this requirement of the plaintiffs, and the latter did the work themselves; and by the time they had finished the work, the New River had been diverted. The plaintiffs then demanded payment for the work, and the dispute went to an arbitrator, who made an award the effect of which we have to consider.

If the plaintiffs had already accepted the work which was done on the old sewer, there was nothing to be sent to arbitration, for in that case they could not charge the defendant for the new work. The arbitrator thought that there was a question whether the plaintiffs had accepted it or not; but I feel considerable doubt whether that was a point which could properly be sent to him; that difficulty, however, does not arise, for it is plain from the award that, if the arbitrator had authority to decide that question, he never finally decided it. The meaning of his award is that he does not know what inference he ought to draw from the facts; he really leaves it to the Court, and the proper inference is that which the jury have found.

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But it is said that, although the plaintiffs may have accepted the old sewer in fact, they could not accept it so as to bind themselves, which is really a question of law arising under the Act of Parliament. When sifted, the contention comes to this, that although the work to be done by a particular owner is done as the scheme shews it ought to be done, yet the local authority are not entitled to accept and adopt it as a sewer if it is not an effective sewer; it does not matter, so it is said, that it is thoroughly well done as a piece of work and is in absolute accordance with the scheme. In the Court below Mathew, J. said that the Act did not say that, and the plaintiffs' counsel have entirely failed to point out anything in the Act which says so in terms. What would be the result of our holding that the Act said so in effect? A sewer might be made through a street, a great portion of its length being upon the land of one owner, continuing through the land of another owner, till it reached its outfall upon the land of a third; if we are to place upon the statute the construction which is suggested, the first owner might do all that he was required to do by the scheme, and the local authority might inspect and express satisfaction with his work, but, because the next owner failed for five or six years to do what he might do at once, and the board did not exercise their power of doing it themselves, the consequence would be that the work of the first owner would become ruinous, and the local authority, after forcing the second man to do his work or doing it themselves, might say to the first owner, "Your part is ruinous; you must do it again or we must do it for you, and you must pay over again although your work was done as well as it could be done." Is there anything in the Act of Parliament which obliges us to place upon it a construction which makes it wholly unreasonable and oppressive? There is, as I have said before, nothing of the kind in terms. It must be remembered that upon the other construction there is no such hardship; we only say that a local authority *may* accept a sewer under such circumstances, not that they *must*. We have not to decide whether they may refuse to accept a part of the work before the whole is completed, for the evidence shews that the plaintiffs did accept the sewer. If a local authority has the

power to say that it will not accept such work, it can say so, and say that it will wait until the scheme is carried out. There is no hardship on a local authority upon the one construction, whereas it is most oppressive to the owners upon the other. It is not necessary for us to-day to decide more than this—that where an owner has done all that he can do on his own land, and the local authority at the time expresses itself satisfied with the work, they cannot go back upon their decision because somebody else has not done that which is necessary to make the work an effective sewer. In *Bonella* v. *Twickenham Local Board* (1), which it is true is not exactly in point, we looked at the Act from the same point of view, and declined to construe it in a way which would be tyrannical and oppressive. I think, therefore, that the judgment of Mathew, J., was right, and ought to be affirmed.

LINDLEY, L.J. I agree. There are some difficulties in the case; but they may be put very shortly. In the first place, I may point out that we are not dealing with the case of a building owner who is endeavouring to foist a defective sewer upon a local authority, as was the case in *Meader* v. *West Cowes Local Board* (2), but we are dealing with a building owner who has been dealing openly, fairly, and honestly with the local authority. Now the land company bought a certain property and sent the local authority a plan of the way in which it was proposed to deal with it, shewing exactly the sewer which it was proposed to make. This plan is really very important: it shews the sewer beginning on the top of the hill, and running down the hill to the New River, which it crosses, and then continuing on the other side. It is, therefore, shewn on the plan that the scheme cannot at the time be carried out; it is essential to its execution that the New River should be diverted, and this the plaintiffs perfectly well knew. The length of the street from the top of the hill to the New River was considerable, and pipes were laid down in the street under the superintendence of the local authority; it is obvious that the man they sent made reports to them, that he approved of the mode in which the work was being done,

(1) 18 Q. B. D. 577; 20 Q. B. D. 63. (2) [1892] 3 Ch. 18.

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Lindley, L.J.

and allowed the whole of the work to be covered in. The local authority never expressed any dissent. The work remained in this state for some years, the delay in diverting the New River preventing the scheme from being carried out as quickly as had been contemplated. The time arrived when it was plain that the New River would be diverted, and the local authority gave the building owner notice to do the work from the top of the hill to the New River all over again; he refused, saying that he had already done it once to their satisfaction. Did he do it to their satisfaction? For if he did, it is admitted that they have no authority to call upon him to do it over again. The award is difficult to construe; but I think that the view of Mathew, J., is right, and that it does not amount to a finding of fact that the local authority did not accept the street as being sufficiently sewered, but that the arbitrator left it to the Court to say whether they had done so.

Looked at in that way, the case raises two important questions. First, could the local authority accept a sewer which had no outfall, although it was part of a scheme of which an outfall was also a part? If they could not, cadit quæstio. This depends upon the provisions of the Public Health Act, 1875. I have looked at many of its numerous sections, and I agree with Mathew, J., that there is no section which prevents their accepting such a sewer. In my judgment it would be mischievous to interpret the Act as meaning that a local authority could not accept a sewer without a separate outfall of its own, although there might be an agreement for the making of the outfall or although they might make it themselves. It is more convenient that a local authority should have power to accept a sewer up to a certain point, and, bearing in mind the great powers as to continuing sewers given to a local authority by s. 16 of the Act, I think it impossible to say that, as a matter of law, they cannot accept a sewer which has no separate outlet; they have such a power, if they think fit to exercise it.

The other question is one of inference. I should be slow to infer that the local authority had accepted an incomplete sewer if there were anything unfair in so holding; but upon the evidence in this case I think the jury came to a perfectly right

conclusion. The arbitrator seems to have been under the impression that they could not do so without some formal act of acceptance, and to have, therefore, left it to the Court; but there is nothing to that effect in the Act, and, coming to the simple question whether the street had been sewered to the satisfaction of the local authority, I should have returned the same answer as the jury. This disposes of the case, and the defendant, having made out that the street had been sewered to the satisfaction of the board, cannot be compelled to do it again.

LOPES, L.J. I am of the same opinion. The dispute has arisen upon s. 150 of the Public Health Act, 1875, which, in the case of a street not being a highway repairable by the inhabitants at large, requires the frontagers to sewer it to the satisfaction of the local authority; if it is once so sewered, the local authority has no jurisdiction afterwards over the frontagers under s. 150, but is itself bound under s. 15 to do the necessary repairs. The question was whether the street was sewered to the satisfaction of the local authority—whether they approved and adopted what was done; and this question was referred to an arbitrator, who has not stated his conclusion as clearly as he might have done. I agree, however, that his intention was to leave it for the decision of the Court. I also agree that the only proper inference from the circumstances which he states in his award is that the local authority did approve and adopt this work.

An all-important fact in the case is that, in 1885, plans of the laying out of this estate were submitted to the local authority—plans which were full and perfect, and which set out everything necessary to enable them to come to a determination; the difficulty as to the New River was apparent on the face of the plans; they were, nevertheless, approved. The works proceeded, a person employed by the board inspected them from time to time, and made suggestions as to the way in which they should be carried out, which were followed by the building owner. The sewer was covered in, and no dissatisfaction was expressed by the local authority; four or five years went by without their saying anything. Is it possible to say that under these circumstances the local authority did not approve of the work? Everything

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contemplated by the scheme which they had power to do had been done by the frontagers, and the only conclusion to which a jury or any reasonable person could come is that the sewer was adopted by the plaintiffs.

A difficulty occurred to me in the course of the case whether the local authority could accept or adopt part of the scheme or of the sewer; but it has been removed. Suppose the case of two owners, each owning part of a street, say a hundred yards: the first owner does his work perfectly, the second does nothing; it cannot be said that the local authority has no jurisdiction to approve and accept the work of the first owner because the second has not done his duty; that would be to say that the interests of the former were to be subordinated to the caprice of the latter. There is no hardship in our holding this; for the local authority have the remedy in their own hands: they can accept the work of the first man, and, when they find that the second man is not proceeding with his portion, they can do it themselves and charge him with the expenses. This removes the only difficulty which I have felt in the case.

Appeal dismissed.

Solicitor for plaintiffs: *Leonard J. Tatham.*
Solicitor for defendant: *Edgar Robins.*

W. J. B.

1893
April 24.

FIRTH & SONS *v.* DE LAS RIVAS AND ANOTHER.

Practice—Service out of Jurisdiction—Appearance under Protest—Order XI.

A foreigner resident out of the jurisdiction, who had been served out of the jurisdiction with a notice of a writ of summons, appeared under protest; in the margin of the appearance was a memorandum that it was entered under protest in order to preserve the defendant's right to object to the jurisdiction:—

Held, that the defendant could properly enter an appearance under protest without losing his right to object to the jurisdiction.

MOTION to set aside service of notice of a writ of summons.

The action was brought against the defendants, Jose Maria Martinez de las Rivas and Sir Charles Mark Palmer, to recover a sum of money alleged to be due upon a contract for steel tubes and other material for the manufacture of cannon to be supplied

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FIRTH & SONS v. DE LAS RIVAS.

by the plaintiffs to the defendants, who had themselves contracted to supply cannon to the Spanish Government.

The defendant, De las Rivas, was a Spanish subject, having no place of business or residence within the jurisdiction, and carrying on business in partnership with his co-defendant, Palmer, at Bilbao, in Spain; the defendant Palmer also carried on business within the jurisdiction, and was a British subject. By the contract, which was in French and was made at Bilbao, the defendants had the option of taking delivery at Jarrow or Bilbao, and of making payment in London or Paris, and they elected to take deliveries at Bilbao, and to make payment at Paris. On February 25, 1893, the plaintiffs obtained leave, upon an ex parte application at chambers, to issue a concurrent writ of summons against the defendant De las Rivas, and to serve notice of the concurrent writ upon him at Bilbao, and on March 3 the notice was duly served upon him. On March 16, an appearance under protest was entered for the defendant De las Rivas, the following memorandum or notification being written in the margin of the appearance: "N.B. This appearance is entered under protest in order to preserve the defendant Martinez de las Rivas' right to object to the jurisdiction." De las Rivas now moved to rescind or set aside the order made at chambers, and to set aside the service of notice of the writ, the appearance, and all proceedings subsequent to the issue of the writ, so far as concerned him. (1)

Danckwerts, for the plaintiffs. The defendant had no power to appear under protest. Such a course is only authorized under Order XLVIII A, r. 7, in the case of a person served as a partner with a writ in the firm name, who may appear under protest and deny that he is a partner. The proper course for the defendant to have taken was under Order XII., r. 30, to move before appearance to set aside the service of notice of the writ. The protest must be disregarded, with the result that the defendant has

(1) It was contended by the plaintiffs that the case fell within the provisions of Order XI., r. 1 (*e*, *g*), but the points raised other than that reported were treated by the Court as amply covered by authority, and it is unnecessary to allude to them in this report, which is confined to the question of the validity and effect of the appearance under protest.

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FIRTH & SONS v. DE LAS RIVAS.

appeared without qualification, and he cannot now object to the jurisdiction.

[*Mayer* v. *Claretie* (1) was referred to.]

Lawson Walton, Q.C., and *Scott Fox*, for the defendant, did not argue as to this point.

WILLS, J. [After dealing with the other points raised in the argument, the learned judge proceeded :—] It has been contended that, by appearing under protest the defendant has appeared for all purposes, and has waived his right to object to the jurisdiction. But, in my judgment, whether the appearance is bad or good, the defendant's rights are not affected; if it is bad, there has been no appearance at all, and the defendant can obviously apply to set aside the service; while, if it is good, the case falls within the decision of the Divisional Court in *Mayer* v. *Claretie* (1), in which the principle was enunciated that an appearance unqualified by protest does not take away the defendant's right to object to the jurisdiction if he gives to the plaintiff notice of his objection at the time of entering the appearance. The case seems quite different from *Davies* v. *André* (2), and other cases in which it has been held that there cannot be a conditional appearance, and I agree entirely with the judgment and the reasons of Mathew, J., in *Mayer* v. *Claretie*. (1) It must be a question for the Court whether the protest is well founded and ought to prevail, or whether the appearance ought to stand, and in the present case the defendant was within his rights in coming to the Court and taking the objection that the judge in chambers had no jurisdiction to make the order. The application must therefore be allowed.

CHARLES, J. I am of the same opinion. The only point on which I have felt any doubt during the argument is, whether by entering an appearance under protest the defendant is precluded from disputing the propriety of serving the notice in lieu of writ upon him; but I think the point is covered by the decision in *Mayer* v. *Claretie*. (1) In that case there was an unconditional appearance accompanied by a notification on a separate

(1) 7 Times L. R. 40. (2) 24 Q. B. D. 598.

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Charles, J.

piece of paper that the defendant would object to the jurisdiction; in the present case, the appearance states on its face that the reason for appearing under protest is to preserve the defendant's right to object to the jurisdiction: the notification is none the worse for being on the same paper as the appearance, and the judgment of Mathew, J., is applicable to this case. Upon the other alternative, if this is a bad appearance, it obviously is open to the defendant to make this application.

Motion allowed.

Solicitor for plaintiffs: *Baillie.*

Solicitors for defendant: *Maples, Teasdale & Co., for Lietch, Dodd, Bramwell & Bell, Newcastle-upon-Tyne.*

W. J. B.

SANDES AND ANOTHER *v.* WILDSMITH AND ANOTHER.

1893 *May* 1.

Practice—Parties—Misjoinder of Plaintiffs—Action for Slander—Claims for several Slanders spoken of different Persons—Order XVI., *r.* 1.

By Order XVI., r. 1, "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative."

Two plaintiffs joined in an action for slander, and delivered a statement of claim alleging several different slanders, some of one plaintiff, and some of the other.

Held, that the plaintiffs were improperly joined, and that they must elect which plaintiff would proceed, and that so much of the statement of claim as related to the other plaintiff must be struck out.

Booth v. *Briscoe* (2 Q. B. D. 496) and *Gort* v. *Rowney* (17 Q. B. D. 625) discussed.

APPEAL by the plaintiffs from the order of Grantham, J., setting aside the writ and statement of claim, for irregularity, and as being an abuse of the process of the Court, on the ground that separate causes of action by the plaintiffs had been improperly joined in one action.

The writ was issued at the suit of the two plaintiffs, who were mother and daughter, against the two defendants, who were husband and wife, and was indorsed with a claim for damages for slander. The statement of claim, in which both plaintiffs

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SANDES v. WILDSMITH.

were joined, alleged, in several paragraphs, the publication by the female defendant of several separate and distinct slanders, imputing acts of larceny, of which slanders some were alleged to have been spoken of the mother only, and some of the daughter only.

Hextall, for the plaintiffs. The order is wrong. The defendants should not have applied, as they did, under Order LXX., r. 1, to set aside the proceedings; but, if any inconvenience arose, they might have applied, under Order XVI., r. 11, to strike out one of the plaintiffs. The effect of Order XVI., r. 1, is to give an unlimited power of joinder, subject only to the power of striking out parties or directing separate trials. This view is supported by the decision of the Court of Appeal in *Booth* v. *Briscoe* (1), and by the judgment of Lord Esher, M.R., in *Gort* v. *Rowney*. (2)

Etherington Smith, for the defendants.

WILLS, J. I am of opinion that the order of Grantham, J., ought to be varied, on the ground that this is not a case for setting aside the writ and statement of claim, and dismissing the action altogether. The order will therefore be varied, by directing that the plaintiffs shall elect, within a week, which plaintiff's claim is to be proceeded with in this action, and the statement of claim and the writ must be amended, by striking out all parts that refer to the claim of the other plaintiff. The rule applicable to the case is Order XVI., r. 1, which provides that "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." I think the governing words there are "the right to any relief claimed," and that the meaning of the rule is, that where it is doubtful in whom a right sought to be enforced is vested, it is permissible to put in all possible claimants, but it does not mean that, where there are two rights which are essentially different from each other, and there is no doubt as to the person in whom each of those rights is vested, it is permissible to roll two actions into one. I do not think the present case

(1) 2 Q. B. D. 496. (2) 17 Q. B. D. 625, at p. 633.

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Wills, J.

is concluded by authority. In *Booth* v. *Briscoe* (1) the point was not the same, for what the Court there held was that, where an action was brought by eight co-trustees for a single libel reflecting on them all, they were all rightly joined as plaintiffs. In the subsequent case of *Gort* v. *Rowney* (2), Lord Esher, M.R., and Bowen, L.J., differed as to the effect of that decision. The Master of the Rolls said: "It seems to me that the judges who decided the case, to which I have just referred" (*Booth* v. *Briscoe* (1)), "construed the rule as meaning that where there are different plaintiffs, who are seeking wholly different relief, they may be joined; that is to say, there is no limit to the power of joinder under the rule; but the power of joinder would be subject to the other rules, and, therefore, the defendant, if he finds himself embarrassed, may apply to have one of the plaintiffs struck out; or, if the judge thinks that the claims of the different plaintiffs cannot properly be dealt with together, he may make an order to strike out one of the plaintiffs, or may direct that there shall be separate trials" (3); and he adds: "I agree with the decision in *Booth* v. *Briscoe* (1) that the rule gives unlimited power to join different plaintiffs, subject to the other rules." (4) Bowen, L.J., said, however: "I wish to add that I am not prepared now to hold that Order XVI., r. 1, gives unlimited power to join plaintiffs. The rule is framed in a peculiar way; the words are 'in whom the right to any relief claimed is alleged to exist,' and it is difficult to say that this means the same as 'any right.' I cannot help thinking that if the framers of the rules had intended to introduce so startling an alteration they would have used more accurate words. I think the Court in *Booth* v. *Briscoe* (1) only held that the action there came within the rule, and that all which the case decides is that the mere fact of a number of separate causes of action being joined does not prevent the case from falling within the rule." (5) The question is therefore an open one, and I am free to express the opinion I have formed.

It matters little, however, in the present case, which construction should be put upon the rule, for I am clearly of opinion that

(1) 2 Q. B. D. 496.
(2) 17 Q. B. D. 625.
(3) 17 Q. B. D. at p. 633.
(4) 17 Q. B. D. at p. 634.
(5) 17 Q. B. D. at p. 635.

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the order authorizing them to defend on behalf of all the members. (1)

Crispe, for the defendants. The order was wrongly made. In the first place, the action will not lie in consequence of the provisions of s. 4 of the Trade Union Act, 1871 (34 & 35 Vict. c. 31).

[WILLS, J. That point does not arise on this motion.]

The defendants cannot be compelled against their will to defend on behalf of the other members of the league. The effect of Order XVI., r. 9, is to limit the old practice of the Court of Chancery as to authorizing parties to defend on behalf of others. That rule can only apply to persons who have or claim some beneficial proprietary right: *Temperton* v. *Russell*. (2) The plaintiff here cannot be said to have or claim any such right.

Poulter, for the plaintiff. The order is right, and can properly be made, even though the defendants may object, for the rule as to authorizing parties to defend on behalf of others was introduced for the benefit of plaintiffs. The rule is stated in Daniell's Chancery Practice, vol. 1, p. 253, 6th ed., as follows: "The rule that all the parties liable to a demand should be before the Court, is subject to the exception that where there are numerous parties having the same interest in one action, one or more of such parties may be sued, or may be authorized by the Court to defend such action on behalf of or for the benefit of all parties so interested; and the persons so interested will, though not actually present as parties, be bound if their representatives were fairly selected, and the matter was fairly contested." That passage states correctly the old practice of the Court of Chancery, and is supported by numerous decisions both before and since the Judicature Acts and Rules: *Cullen* v. *The Duke of Queensberry* (3), affirmed in the House of Lords by *The Duke of*

(1) By Order XVI., r. 9: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested."

(2) [1893] 1 Q. B. 435, at p. 438.

(3) 1 Bro. C. C. 101.

Queensberry v. *Cullen* (1); *Lloyd* v. *Loaring* (2); *Adair* v. *The New River Company* (3); *Pare* v. *Clegg* (4); *Bromley* v. *Williams* (5); *May* v. *Newton* (6); *Andrews* v. *Salmon* (7); *Griffith* v. *Pound.* (8) No such limitation as is suggested has been introduced by Order XVI., r. 9.

Crispe, replied.

WILLS, J. I am of opinion that the order of Bruce, J., is right. The action is brought to enforce a contractual obligation, and the Courts exist for the purpose of controlling a disposition, which is frequently met with, to endeavour to escape from liability. For a very long time past the Court of Chancery has been in the habit of allowing a certain number of a class of defendants to represent the whole body. An instance of this practice is afforded by the case of *Bromley* v. *Williams* (5), where Sir John Romilly, M.R., said: "If that be so, provided all the members of the association were made parties, then this rule is well established:—that if they are so numerous that they cannot be made parties to the cause, with any chance of bringing it to a hearing in consequence of abatements and the like difficulties, then you may make two or three of a class defendants to represent the interest of all that class. Formerly that was not the practice of this Court, but the rules have been modified and altered so as to suit the exigencies of modern practice, as was done by Lord Cottenham in several instances. But if there be three or four classes who have separate and conflicting interests, then you may select two or three from each class to represent that interest, in the same way as if the whole class had been brought before the Court." (9) The Master of the Rolls was there speaking of a suit brought against seven persons as representing a large class who had agreed to contribute in the case of the loss of a ship belonging to a member of the insurance club. I cannot see any distinction between that case and the present. The judgment of the Master of the

(1) 1 Bro. P. C. 396.
(2) 6 Ves. 773.
(3) 11 Ves. 429.
(4) 29 Beav. 589.
(5) 32 Beav. 177.
(6) 34 Ch. D. 347, at p. 349.
(7) W. N. (1888) 102, 176.
(8) 45 Ch. D. 553, at pp. 566, 567.
(9) 32 Beav. at p. 188.

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Rolls is a direct authority. But then it is contended on behalf of the defendants that Order XVI., r. 9, has altered the practice. I do not think so. I think that rule was intended to make the practice of the Court of Chancery applicable to all actions, and I feel sure that there was no intention to narrow the beneficial doctrine which had previously prevailed. The law is not so defective as the argument for the defendants would lead one to suppose. It is further contended that the judgment of the Court of Appeal in *Temperton* v. *Russell* (1) has confined the right given by Order XVI., r. 9, within narrower limits than those of the doctrine of the Court of Chancery. I cannot agree with that contention. If I did I should of course follow the decision of the Court of Appeal; but on examining the language of Lindley, L.J., it is clear that he was not narrowing the existing practice, but was drawing a distinction between actions of contract and actions of tort. What he said was: "This expression only extends, we think, to persons who have or claim some beneficial proprietary right, which they are asserting or defending in the cause or matter. The plaintiff in this case sues for damages, and the action . . . . is founded on tort. The old Court of Chancery had no jurisdiction to grant relief in such an action; and, although its rules as to parties to actions or suits maintainable in it have now to be applied in all Divisions of the High Court when exercising the old jurisdiction of the Court of Chancery, the rules ought not to be construed as creating a jurisdiction in one Division, which was never exercised by any Court in the country before the rules were made." (2) The Lord Justice in that passage was referring to the well-established practice of the Court of Chancery, and was pointing out that the numerous cases in which the jurisdiction has been exercised in suits brought to enforce obligations relating to property were no authorities for the exercise of a similar jurisdiction in the case of an action founded on tort. I am of opinion that the right to have 6*d.*, which is conferred on the plaintiff in the present case by the 27th rule of the league, is a beneficial proprietary right.

For these reasons I am of opinion that the order appealed from is right, and ought to be affirmed.

(1) [1893] 1 Q. B. 435. (2) [1893] 1 Q. B. at p. 438.

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It has been suggested that s. 4 of the Trade Union Act, 1871, applies, and that this action will not lie; but that is not before us now, for it is not possible to settle that point without considering the whole of the rules, which are not before us on this motion. If there is anything in the point it can be raised hereafter.

LAWRANCE, J., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Finch & Turner.*
Solicitor for defendants: *J. Turner.*

P. B. H.

SHAW, APPELLANT; RECKITT, RESPONDENT.

(THE PONTEFRACT ELECTION PETITION.)

1893
April 24.

Parliamentary Election—Election Petition—Amendment—Leave of High Court—Judge not on the Rota for the Trial of Election Petitions—Ex parte Application—Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 *Vict. c.* 51), *ss.* 40, 56.

A judge of the High Court who is not for the time being on the rota for the trial of election petitions has no jurisdiction to grant leave, under s. 40 of the Corrupt and Illegal Practices Prevention Act, 1883, to amend an election petition. Such leave ought not to be granted upon an ex parte application.

APPLICATION to set aside an order of Grantham, J., giving leave to amend an election petition by inserting allegations of certain illegal practices against the respondent.

It appeared that the return of the election expenses of the respondent was made on March 20, and on March 25 a copy of the return was furnished to the petitioner. On March 29, the petitioner obtained from Grantham, J., at chambers, on an ex parte application, an order for leave to amend the petition by adding certain charges of illegal practices. Grantham, J., was not at that time on the rota for the trial of election petitions, but on March 29, which was the last day of the sittings, no judge for the time being on the rota for the trial of election petitions, was sitting at the Royal Courts of Justice.

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Pope, Q.C., and *S. H. Day*, for the respondent in the petition. The judge had no jurisdiction to make the order. He was not one of the election judges. The order purports to be made under s. 40, sub-s. 2, of the Corrupt Practices Act, 1883 (1), which provides for the amendment of a petition by inserting allegations of illegal practices "with the leave of the High Court." Sect. 56 shews that that leave can only be given by one of the judges for the time being on the rota for the trial of election petitions. No doubt that is "subject to any rules of Court"; but that provision does not refer to the rules which were made under s. 25 of the Parliamentary Elections Act, 1868, but only to any rules which might be made under the provisions of s. 56, sub-s. 2, of the Act of 1883 by the Rule Committee.

Secondly, even if the judge had jurisdiction to make the order, there was no jurisdiction to do so on an ex parte application. It is clear from s. 40, that it was not intended that the leave of the High Court to amend a petition should be given as a matter of course.

Bigham, Q.C., and *William Graham*, for the petitioner. The rules made under the Act of 1868 apply, and, by rule 44 of the Petition Rules, all interlocutory questions and matters shall be heard and disposed of by one of the judges upon the rota if

(1) By the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 40: "(2.) Any election petition presented within the time limited by the Parliamentary Elections Act, 1868, may, for the purpose of questioning the return or the election upon an allegation of an illegal practice, be amended with the leave of the High Court within the time within which a petition questioning the return upon the allegation of that illegal practice can under this section be presented."

By s. 56: "(1.) Subject to any rules of Court, any jurisdiction vested by this Act in the High Court may, so far as it relates to indictments or other criminal proceedings, be exercised by any judge of the Queen's Bench Division, and in other respects may either be exercised by one of the judges for the time being on the rota for the trial of election petitions, sitting either in Court or at chambers, or may be exercised by a master of the Supreme Court of Judicature in manner directed by and subject to an appeal to the said judges."

"(2.) Rules of Court may from time to time be made, revoked, and altered for the purposes of this Act, and of the Parliamentary Elections Act, 1868, and the Acts amending the same, by the same authority by whom rules of Court for procedure and practice in the Supreme Court of Judicature can for the time being be made."

practicable, and if not then, by any judge at chambers. It was not practicable to apply within the time limited by s. 40 to any of the judges on the rota.

The rules made under the Act of 1868 are the only existing rules of Court as to election petitions, and if they have no application, then s. 56 has no limitation at all, and in the absence of all the election judges it would be impossible to get leave to amend a petition. There is nothing to prevent a judge from giving leave to amend a petition on an ex parte application. If he has made the order on insufficient materials, that may be ground for appeal, but it does not affect his jurisdiction to make the order.

HAWKINS, J. I am of opinion that the order ought to be rescinded. The election petition had been filed, and an application was made to Grantham, J., at chambers, for leave to amend it under s. 40, sub-s. 2, of the Corrupt and Illegal Practices Act, 1883, which provides that a petition may be amended with the leave of the High Court. We go to s. 56 to find out the manner in which the leave of the High Court is to be given. That section says that, "subject to any rules of Court," the jurisdiction vested in the High Court by the Act may, except in so far as it relates to indictments or other criminal proceedings, be exercised by one of the judges for the time being on the rota for the trial of election petitions, or by a master in the manner directed by and subject to an appeal to such judges. It is clear that the word "may" in the section should be read as equivalent to "must," and therefore, except where the proceedings relate to indictments or other criminal matters, the jurisdiction given by s. 40 as to granting leave to amend a petition can only be exercised by a judge on the rota of election judges or by a master in the manner directed by and subject to an appeal to such judges.

In my opinion the rules made under s. 25 of the Corrupt Practices Act, 1868, have no application. The rules of Court to which s. 56, sub-s. 1, alludes are clearly only those which may be made under sub-s. 2 of the same section. I think, therefore, that Grantham, J., not being a judge on the rota of election judges, had no jurisdiction to grant leave to amend this petition. That

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HAWKINS, J.

is, however, not all. I am clearly of opinion that an order granting leave to amend a petition should not be made except on an exercise of the discretion of the judge making the order. In this case the judge did not exercise his discretion at all. The respondent was entirely unrepresented, and the order was made ex parte without any inquiry into the facts. I think that the order must be set aside.

CAVE, J. I am of the same opinion. Sect. 40, sub-s. 2, of the Act of 1883, confers a jurisdiction as to the amendment of election petitions by adding allegations of illegal practices which had not been given by the Act of 1868, and s. 56 provides for the manner in which that jurisdiction is to be exercised. To my mind it is quite clear that the rules of Court to which reference is made in s. 56 are not those which had been made under s. 25 of the Act of 1868, but those which might thereafter be made by the Rule Committee under the provisions of s. 56, sub-s. 2, of the Act of 1883. No such rules have ever been made by the Rule Committee, and therefore the operation of s. 56 is not limited by any rules at all. That being so, it is quite clear that the only judges who have power to grant leave to amend election petitions under s. 40 are judges for the time being on the rota for the trial of such petitions, and consequently that my brother Grantham had no jurisdiction to give such leave. I am inclined to agree with my brother Hawkins that a judge has no power to grant such leave on an ex parte application, and I am clear that, even if he has the power to do so, he ought not to grant leave to amend without hearing the respondent. The attention of Grantham, J., does not seem to have been called to the provisions of s. 40, which I think clearly shew that it was not the intention of the legislature that leave to amend petitions should be given on ex parte applications.

Order set aside.

Solicitor for petitioner: *Chatterton.*

Solicitors for respondent: *Day, Russell, & Co.*

A. P. P. K.

END OF VOL. I.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 2, 1893, will be as follows:—

In the First Series,
[1893] 1 Ch. [1893] 2 Ch. [1893] 3 Ch.

In the Second Series,
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ACT OF BANKRUPTCY—Assignment of debtor's property to trustees for benefit of creditors generally - - - 595
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ACTION, CAUSE OF — *Maliciously procuring Breach of Contract, Action for—Conspiracy to injure Person by preventing others from dealing with him—Trade Union.*] The defendants were members of a joint committee of three trade unions connected with the building trade in Hull. A firm of builders there having refused to obey certain rules laid down by the unions with regard to building operations, the unions sought to compel them to do so, by preventing the supply of building materials to them. In pursuance of this object, they requested the plaintiff, a master mason and builder in Hull, who supplied building materials to the firm, to cease to supply them with such materials, but the plaintiff refused to do so. Thereupon, with the object of injuring the plaintiff in his business, in order to compel him to comply with such request, the defendants induced persons who, to the knowledge of the defendants, had entered into contracts with the plaintiff for the supply of materials, to break their contracts, and not to enter into further contracts with the plaintiff, by threatening that the workmen would be withdrawn from their employ. The plaintiff sustained damage in consequence of such breaches of contract, and of the refusal of such persons to enter into contracts with him:—*Held*, that an action was maintainable by the plaintiff against the defendants for maliciously procuring such breaches of contract, and also for maliciously conspiring together to injure him by preventing persons from entering into contracts with him.—The right of action for maliciously procuring a breach of contract is not confined to contracts in the nature of contracts of personal service. TEMPERTON *v.* RUSSELL - - C. A. 715

ADVERTISEMENT—Contract — Performance of condition - - - - 256
See CONTRACT.

APPEAL — Court of appeal—Award — Special case—Practice - - - 375
See WATERWORKS.

—— Court of Appeal—Application for leave to appeal in formâ pauperis - - 417
See PRACTICE.

APPRENTICE—Deed—Contract not for benefit of infant - - - - 310
See INFANT.

ARBITRATION—*Award—Referring back Award—Discovery of Material Evidence after the making of Award—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 10.] Under s. 10 of the Arbitration Act, 1889, the Court or a judge has power to remit an award to the arbitrator for reconsideration where it appears that since the making of the award material evidence has been discovered which might have affected the arbitrator's decision.—*Burnard* v. *Wainwright* (19 L. J. (Q.B.) 423; 1 L. M. & P. 455) approved. IN RE KEIGHLEY, MAXSTED & CO. AND BRYAN DURANT & CO. [C. A. 405

—— Reference of cause or matter—Question in dispute consisting wholly or in part of matters of account - - - 177
See PRACTICE.

—— Reference of matters in dispute in action—Inspection of property—Concurrent jurisdiction of judge and referee - 545
See PRACTICE.

ARREST—*Debtors Act—"Default in Payment of a Sum of Money"*—32 & 33 *Vict. c.* 62, *ss.* 4, 5.] An order was made in interpleader proceedings that the sheriff should sell the goods seized and pay the claimant, the execution creditor undertaking to make good any deficiency on sale. There was a deficiency, and the master ordered that the execution creditor should pay the amount to the claimant. Default being made in payment, an order was made committing the execution creditor for contempt of Court. There was no proof that he had means to pay:—*Held*, that the

ARREST—*continued.*
case was one of default in payment of a sum of money, within the meaning of s. 4 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), and that an order of commitment could not be made. BUCKLEY *v.* CRAWFORD - - - - - 105

ASSETS — Bankruptcy — Relation of trustee's title - - - - - 175
See BANKRUPTCY.

BANKRUPTCY—*Act of Bankruptcy—Assignment of Debtor's Property to Trustees for benefit of Creditors generally—Exception of Leaseholds—Declaration of Trust of Leaseholds—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*a*).] A debtor executed a deed by which he granted and assigned all his property (except leaseholds) to trustees, on trust for realization and division among all his creditors as in bankruptcy. And by the same deed the debtor declared that he would stand possessed of all leaseholds in trust for and to convey and assign the same as the trustees should from time to time direct:—*Held*, by the Court of Appeal (Lindley, L.J., and Lopes, L.J.), Lord Esher, M.R., dissenting, that this deed was, within the meaning of sub-s. 1 (*a*) of s. 4 of the Bankruptcy Act, 1883, a conveyance or assignment of the debtor's property to trustees for the benefit of his creditors generally, and that its execution was therefore an act of bankruptcy.—*In re Spackman* (24 Q. B. D. 728) considered. IN RE HUGHES. EX PARTE HUGHES [C. A. 595

2. —— *Assets—Relation of Trustee's Title—Money paid to Solicitor—Money handed by Debtor to Solicitor as Security for future Costs—Claim to retain for Services rendered after Act of Bankruptcy—Mutual Dealings—Set-off—Claim to set off Debt for Past Services against Claim of Trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 38.] A debtor consulted a solicitor to whom he was then indebted for costs. The solicitor declined to act further unless he were furnished with money to meet future costs, and the debtor placed money in his hands for that purpose. The solicitor then called the debtor's creditors together, and prepared a deed of assignment, which the debtor executed. The debtor was afterwards adjudged bankrupt, the act of bankruptcy being the execution of the deed of assignment.—On an application for payment to the trustee in bankruptcy of the money in the hands of the solicitor:—*Held*, that the solicitor was not entitled to retain the money as payment for services rendered by him to the debtor after the execution of the deed of assignment: *Held*, also, that there had not been mutual dealings between the debtor and the solicitor within the meaning of s. 38 of the Bankruptcy Act, 1883, and, therefore, the solicitor could not set off against the claim of the trustee a debt due to him from the debtor for professional services rendered before the money was placed in his hands.—*In re Sinclair, Ex parte Payne* (15 Q. B. D. 616) distinguished. IN RE POLLITT. EX PARTE MINOR. [*See next case*] [175

3. —— *Assets—Relation of Trustee's Title—Money handed by Debtor to Solicitor to answer future Costs—Claim to retain for Services rendered after Act of Bankruptcy — Mutual Dealings — Set-off—Claim to set off Debt for Past Services against Claim of Trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 38, 43, 44.] A debtor consulted a solicitor to whom he was then indebted for costs. The solicitor declined to act further unless he were furnished with money to meet future costs, and the debtor placed money in his hands for that purpose. The solicitor then called the debtor's creditors together, and prepared a deed of assignment, which the debtor executed. The debtor was afterwards adjudged bankrupt, the act of bankruptcy being the execution of the deed of assignment.—On an application for payment to the trustee in bankruptcy of the money in the hands of the solicitor:—*Held*, by the Court of Appeal, affirming the decision of the Queen's Bench Division, that the solicitor was not entitled to retain the money as payment for services rendered by him to the debtor after the execution of the deed of assignment:—*Held*, also, that there had not been mutual dealings between the debtor and the solicitor within the meaning of s. 38 of the Bankruptcy Act, 1883, and, therefore, the solicitor could not set off against the claim of the trustee a debt due to him from the debtor for professional services rendered before the money was placed in his hands.—*In re Sinclair, Ex parte Payne* (15 Q. B. D. 616) distinguished. IN RE POLLITT. EX PARTE MINOR - C. A. 455

4. —— *Bankruptcy Notice—"Final Judgment"—Decree for Dissolution of Marriage—Order for Payment of Costs by co-Respondent—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-ss.* 1 (*e*), 1 (*g*).] In a suit by a husband against his wife for dissolution of the marriage on the ground of her adultery, a decree nisi for dissolution was made, the decree containing an order for the payment of the petitioner's costs by the co-respondent. The decree was afterwards made absolute; the costs were taxed at 204*l.*, and an order was made that the co-respondent should pay the amount within a specified time. He failed to comply with the order:—*Held*, that there had not, within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, been a "final judgment" for the amount, and that the petitioner could not issue a bankruptcy notice against the co-respondent in respect of it. IN RE BINSTEAD. EX PARTE DALE - - - C. A. 199

5. —— *Gasworks Clauses Acts—Recovery of Gas Rents—Receiving Order—Official Receiver—"Occupier"—Gasworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 15), *s.* 16—*Gasworks Clauses Act*, 1871 (34 & 35 *Vict. c.* 41), *ss.* 11, 39—*Metropolis Gas Act* (23 & 24 *Vict. c.* 125), 1860, *ss.* 4, 14–19, 39.] By the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 16, the undertakers of gasworks are empowered to cut off the gas from the premises of any person for non-payment of rent due for gas supplied to him. By the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 11, it is made compulsory upon the undertakers, when required by the "owners or occupiers" of any premises within the prescribed limits, to supply gas to such premises; and by s. 39, in case any consumer leaves the premises where gas has been supplied to him without paying the gas rent the

BANKRUPTCY—*continued.*
undertakers shall not be entitled to require from the next tenant of such premises the payment of the arrears left unpaid by the former tenant. A receiving order having been made against a debtor, the gas company cut off the supply of gas to his premises, and refused to reconnect it until the arrears of gas rent due from him were paid, whereupon the official receiver paid the amount under protest. The debtor having been adjudged bankrupt:—*Held*, that the trustee in bankruptcy was not entitled to recover back from the gas company the amount so paid by the official receiver, for, notwithstanding the receiving order, the debtor continued to be the occupier of the premises, and there was consequently no obligation on the part of the company to supply gas to such premises without payment of the arrears due to them. In re Smith. Ex parte Mason - - - - - - 323

6. —— *Gift of Jewels by Husband to Wife—"Settlement"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.] By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47: "(1.) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy."—"(3.) 'Settlement' shall, for the purposes of this section, include any conveyance or transfer of property."—Upon an application under the above section to avoid a gift of valuable jewellery by the bankrupt, it appeared that such jewellery had been given by him as a present to his wife within two years of his bankruptcy. There was no transfer in writing:—*Held*, that to bring a transfer of personal property within the section it must be manifest from the nature and circumstances of the case that it was the object of the transferor that the subject-matter of the transfer should permanently remain the property of the transferee; that it must be taken that the bankrupt contemplated the retention by his wife of the present which he had given her; and that the gift was void against the trustee in the bankruptcy. In re Vansittart. Ex parte Brown - 181

7. —— *Petitioning Creditor—Locus standi—Purser of Cost Book Mine—Stannaries Act*, 1869 (32 & 33 *Vict. c.* 19), *ss.* 2, 13.] Sect. 13 of the Stannaries Act, 1869, provides that an unpaid call on any share in a cost book mining company shall be deemed to be a debt due from the shareholder to the company, and that, if the shareholder fails to pay the call at the appointed time, "it shall be lawful for the company to sue the shareholder for the amount of such call, in any Court of Law having competent jurisdiction, in the name of the purser for the time being of the company, as the nominal plaintiff for the company, and to recover the amount of such call":—*Held*, that, when judgment has been recovered in an action by such a company, in the name of the purser as nominal plaintiff, against

BANKRUPTCY—*continued.*
a shareholder for an unpaid call, the purser is not authorized by s. 13 to present a bankruptcy petition in his own name on behalf of the company against the shareholder, in respect of the judgment debt, but that the company must itself petition. In re Nance. Ex parte Ashmead [C. A. 590

8. —— *Preferential Payment—Debt due to Friendly Society by Bankrupt Treasurer—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 15 (7) *—Bankruptcy Act*, 1883, *s.* 40—*Preferential Payments in Bankruptcy Act*, 1888 (51 & 52 *Vict. c.* 62), *s.* 2 (1).] Sect. 15 of the Friendly Societies Act, 1875, provides that registered friendly societies "shall be entitled to the following privileges" (inter alia), "(7.) Upon the bankruptcy of any officer of a society having in his possession by virtue of his office any money or property belonging to the society . . . his trustee in bankruptcy shall upon demand in writing . . . pay such money and deliver over such property to the trustees of the society, in preference to any other debts or claims against the estate of such officer":—*Held*, that under this section the trustees of a friendly society are, upon the bankruptcy of the treasurer of the society, entitled to be paid out of his estate the balance due from him to the society in respect of moneys which he has received for them, even though he has not in his possession those moneys in specie, and they cannot be traced.—The decision of Bacon, C.J., in *Ex parte Edmonds* (30 W. R. 432), approved. In re Miller. Ex parte Offical Receiver [C. A. 327

9. —— *"Secured Creditor"—Judgment Creditor—Equitable Execution—Order appointing Receiver of Debtor's Interest in Residuary Estate under a Will—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 10, 45, 168.] Judgment creditors obtained, in the action in which they had recovered the judgment, an ex parte order appointing a receiver, to receive the moneys receivable in respect of the share to which the debtor was entitled in the residuary estate under the will of his mother; and it was ordered that the receiver should pay the balance or balances appearing due on his accounts, or such part thereof as should be certified as proper to be so paid, in or towards satisfaction of what should for the time being be due in respect of the judgment. After the order had been made, notice of it was served upon the executors of the mother. Before any payment had been made by the executors to the receiver on account of the debtor's share, a receiving order in bankruptcy was made against him, and he was soon afterwards adjudicated a bankrupt:—*Held*, that the order appointing a receiver did not make the judgment creditors "secured creditors" within the meaning of ss. 9 and 168 of the Bankruptcy Act, 1883; that the order did not amount to a delivery of the share in equitable execution to the judgment creditors; and that they had by virtue of the order no priority over the other creditors of the bankrupt.—Such an order appointing a receiver ought not to be made ex parte. In re Potts. Ex parte Taylor - C. A. 648

BEER—Sale during prohibited hours 49, 522
See Licensing Acts. 1, 2.

BEER—*continued.*
—— Sale of—Licence—Transfer - - 635
See LICENSING ACTS. 5.
—— Sale of—Licence—Renewal - - 275
See LICENSING ACTS. 3.

BETTING—Gaming Act, 1892—Act not retrospective - - - - 41
See GAMING.
—— Money paid—Implied contract—Gaming Act, 1892 - - - - 44
See GAMING. 2.

BILL OF EXCHANGE—*Practice—Indorsement on Writ—Liquidated Demand—Expenses of Noting—"Bank Charges"—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 57.] By s. 57 of the Bills of Exchange Act, 1882, the holder of a bill may recover the expenses of noting, which are to be deemed to be liquidated damages. In an action on a bill of exchange the writ was indorsed with a claim for the amount of the bill and a further sum described as "bank charges." The defendant failed to appear, and the plaintiff entered final judgment for the sum indorsed. On appeal against an order setting aside the judgment:—*Held*, that the words "bank charges" were a sufficient description of the expenses of noting; that the writ was therefore indorsed for a liquidated demand, within the meaning of Order XIII., r. 3, and final judgment was properly entered. DANDO *v.* BODEN - - - 318

BILL OF SALE—*Registration*—"*Schedule or Inventory therein referred to*"—*Specific Description of Chattels—Bills of Sale Act.* 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 2—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 4.] The grantor of a bill of sale, given as a security for an advance, was, at the time of the execution of such bill of sale, possessed of books to the number of 1800 volumes, which were in a study at his house. The schedule annexed to the bill of sale commenced with the words: "The whole of the chattels at present at W. Vicarage, and consisting inter alia of the following." It then proceeded to specify the furniture and other chattels contained in each of the rooms in the house. Under the head "Study" was the item, "Eighteen hundred volumes of books as per catalogue." There was a catalogue of the books in the study in existence previously to the bill of sale. There was no evidence of facts shewing that there was any difficulty in identifying the books comprised in the bill of sale without referring to the catalogue:—*Held*, that the catalogue was not a schedule or inventory referred to in the bill of sale within the meaning of sub-s. 2 of s. 10 of the Bills of Sale Act, 1878, and therefore it was not necessary that it should be registered together with the bill of sale; and also that the books were "specifically described" in the schedule within the meaning of the 4th section of the Bills of Sale Act (1878) Amendment Act, 1882, inasmuch as the words "as per catalogue" were not restrictive of the previous part of the description, which sufficiently identified the books assigned. DAVIDSON *v.* CARLTON BANK C. A. 82

2. —— *Property in Goods—Seizure—Removal of Goods—Tender of Debt, Costs, and Expenses—*

BILL OF SALE—*continued.*
Right to redeem—Terms of Redemption—Damages for Injury to Goods in Removal—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 7, *Schedule.*] The grantee of a bill of sale, given by way of security for the payment of money, seized the goods on default by the grantor in payment of an instalment due under the deed. At the expiration of five days from the seizure the grantee began to remove the goods, and the grantor then tendered the amount due for debt, interest, and expenses. The grantee refused to accept the tender, and the grantor brought an action, claiming in trespass for damages for removal of the goods, and for injury to them in the course of removal, and, further, claiming to redeem:—*Held*, that the action of trespass would not lie, as at the time of the removal of the goods the property in and the right to possession of the goods were in the grantee, and that the grantor was only entitled to redeem on payment of the debt, interest, and expenses, and the costs arising from the claim to redeem, but was entitled to set off any damages arising from injury done to the goods through the negligence of the grantee in the course of removal. JOHNSON *v.* DIPROSE [C. A. 512

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—— *Booth* v. *Briscoe* (2 Q. B. D. 496) discussed
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—— *Gort* v. *Rowney* (17 Q. B. D. 625) discussed
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—— *Heaven* v. *Pender* (11 Q. B. D. 503) distinguished - - - - 491
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—— *Kay* v. *Atherton Local Board* (42 J. P. 792) overruled - - - - 643
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—— *Knight and the Tabernacle Permanent Building Society, In re* ([1892] 2 Q. B. 613) distinguished - - - 375
See WATERWORKS.

—— *Lenham* v. *Barber* (*The Hereford Municipal Election Petition*) (10 Q. B. D. 293) distinguished - - - - 118
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—— *Meakin* v. *Morris* (12 Q. B. D. 352) approved
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—— *Pulbrook* v. *Richmond Consolidated Mining Co.* (9 Ch. D. 610) followed - 1
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—— *Robert, In re, Kiff* v. *Roberts* (33 Ch. D. 265) followed - - - 417
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—— *Sinclair, In re, Ex parte Payne* (15 Q. B. D. 616) distinguished - - 175, 455
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—— *Spackman, In re* (24 Q. B. D. 728) considered - - - - 595
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—— *Taylor* v. *Meltham Local Board* (47 L. J. (C.P.) 12) overruled - - 643
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—— *Walker* v. *Crystal Palace District Gas Co.* ([1891] 2 Q. B. 300) not followed 362
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—— *Watson* v. *Birch* (15 Sim. 523) followed [25, 189
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CHARGING ORDER—Shares—Director of company — Qualification — Possession of shares "in his own right" - 1
See PRACTICE. 2.

COMMON—*Copyhold—Custom for Lord to make Grants of Waste—Consent of Homage—Enfranchisement — Statutory Reservation of Right of Common—Copyhold Act*, 1852 (15 & 16 *Vict. c.* 51), *s.* 45.] Where a custom existed in a manor for the lord, with the consent of the homage, to make grants of portions of the waste, to be held on copyhold tenure, although a sufficiency of common was not left:—*Held*, that such a grant might be made by the lord, with the consent of the homage, as against a commoner, although his tenement had been enfranchised under the Copyhold Act, 1852, and he could therefore no longer attend the manor court. RAMSEY *v.* CRUDDAS [C. A. 228

COMPANY—*Winding-up—County Court—Jurisdiction—Title to Property—Question between the Liquidator and a Stranger—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss*, 98, 164—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63).] Where a petition to wind up a company is presented to a county court under 53 & 54 Vict. c. 63, s. 1, sub-s. 3, the judge of the county court has no jurisdiction to make an order deciding a question as to title to property, which arose before the commencement of the winding-up, between the company and a stranger. IN RE ILKLEY HOTEL COMPANY - - - - - 248

—— Shares—Charging order—Director of company — Qualification — Possession of shares "in his own right" - 1
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CONSPIRACY—Maliciously procuring breach of contract—Action for - - 715
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CONTEMPT—Arrest—Debtors Act—"Default in payment of money" - - 105
See ARREST.

CONTRACT—*Offer by Advertisement—Performance of Condition in Advertisement—Notification of Acceptance of Offer — Wager — Insurance — 8 & 9 Vict. c.* 109—14 *Geo.* 3, *c.* 48, *s.* 2.] The defendants, the proprietors of a medical preparation called "The Carbolic Smoke Ball," issued an advertisement in which they offered to pay 100*l.* to any person who contracted the influenza after having used one of their smoke balls in a specified manner and for a specified period. The plaintiff on the faith of the advertisement bought one of the balls, and used it in the manner and for the period specified, but nevertheless contracted the influenza:—*Held*, affirming the decision of Hawkins, J., that the above facts established a contract by the defendants to pay the plaintiff 100*l.* in the event which had happened; that such contract was neither a contract by way of wagering within 8 & 9 Vict. c. 109, nor a policy within 14 Geo. 3, c. 48, s. 2; and that the plaintiff was entitled to recover. CARLILL *v.* CARBOLIC SMOKE BALL COMPANY - C. A. 256

COPYHOLD—Custom for lord of manor to make grants of waste—Consent of homage—Enfranchisement - - - 228
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COPYRIGHT — *Design — Registration — Subject-matter—Novelty—View of Westminster Abbey—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 47, 60.] The expression "new and original design" in s. 47 of the Patents, Designs, and Trade Marks Act, 1883, does not import novelty in the subject-matter of the design, but novelty in the application of the design to some article of manufacture.—A design in metal for the handles of spoons and forks represented a view of Westminster Abbey, and was taken from a photograph:—*Held*, that such design was a proper subject for registration under the Act.—*Adams* v. *Clementson* (12 Ch. D. 714) doubted. SAUNDERS *v.* WIEL - - - C. A. 470

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—— Security for—Counter-claim arising out of same transaction as action - 560
See PRACTICE. 19.

—— Solicitor—Commission—Sale of property by auction—Property sold in lots - 16
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—— Taxation—Refresher fees to counsel 362
See PRACTICE. 4.

COUNTY COURT—Costs—Action commenced in High Court and transferred to county court—Recovery of sum less than 20*l.*
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CRIMINAL LAW—*Offences against the Person—Male under Fourteen—Acquittal on Charge of Carnally Knowing Girl under Thirteen—Indecent Assault—Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *ss.* 4, 9.] Although a boy under fourteen, who is tried on an indictment under s. 4 of the Criminal Law Amendment Act, 1885, charging him with having had carnal knowledge of a girl under thirteen, is entitled to be acquitted of that offence, he may be convicted of an indecent assault under s. 9 of the Act. THE QUEEN *v.* WILLIAMS - - C. C. R. 320

2. —— *Offences against the Person—Manslaughter—Neglect to provide Food or Medical Attendance for Person of Full Age.*] The prisoner, a woman of full age and without any means of her own, lived with and was maintained by the deceased, her aunt, a woman of seventy-three. No one lived with them. For the last ten days of her life the deceased suffered from a disease which prevented her from moving or doing anything to procure assistance; during this time the prisoner lived in the house and took in the food supplied by the tradesmen, but apparently gave none of it to the deceased, nor did she procure for her any medical or nursing attendance, or inform any one of the condition of the deceased, although she had abundant opportunity to do so. No one but the prisoner had any knowledge of the condition of the deceased prior to her death, which was substantially accelerated by want of food, nursing, and medical attendance:—*Held*, that a duty was imposed upon the prisoner under the circumstances to supply the deceased with sufficient food to maintain life, and that, the death of the deceased having been accelerated by the neglect of such duty, the prisoner was properly convicted of manslaughter. THE QUEEN *v.* INSTAN [450

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DEBENTURE—Company—Assignment 539, 744
See FRAUDS, STATUTE OF. 1, 2.

DEFAMATION — *Libel — Privilege — Report of Judicial Proceedings — Ex parte Application to Magistrates for Summons.*] The publication, without malice, of a fair and accurate report of proceedings in open Court, before magistrates, upon an ex parte application for the issue of a summons for perjury, is privileged. KIMBER *v.* PRESS ASSOCIATION - - - C. A. 65

—— Embarrassing pleading - - 571
See PRACTICE. 25.

DEPOSIT—Vendor and Purchaser—Payment of deposit to solicitor as agent—Action to recover deposit from agent - 350
See PRINCIPAL AND AGENT. 2.

DESIGN — Copyright—Registration—Novelty—View of Westminster Abbey - 470
See COPYRIGHT.

EDUCATION ACTS—*Board School—Authority of Head Master—Punishment of Pupil for acts done on Way to School.*] The authority delegated by the parent of a pupil to a schoolmaster to inflict reasonable personal chastisement upon him is not limited to offences committed by the pupil upon the premises of the school, but may extend to acts done by such pupil while on the way to and from school. CLEARY *v.* BOOTH - - 465

EJECTMENT—Forfeiture—Parties necessary on application for relief—Original lessee
See LANDLORD AND TENANT. 3. [604

ELECTION — Petition—Particulars—Scrutiny—Claim of seat - - - 113
See PARLIAMENT—ELECTION PETITION. 4.

—— Petition—Change of venue—"Special circumstances" - - - 245
See PARLIAMENT—ELECTION PETITION. 2.

—— Petition—Amendment - - 779
See PARLIAMENT—ELECTION PETITION.

EXECUTION — Receiver, Appointment of — Future earnings of judgment debtor
See PRACTICE. 9. [551
—— Equitable—Receiver - - - 648
See BANKRUPTCY. 9.

FACTOR—*Person Employed to Sell on Commission —Goods Pledged with Pawnbroker—Validity of Pledge—Factors Act*, 1889 (52 & 53 *Vict. c.* 45), *ss.* 1, 2.] The plaintiffs, a firm of jewellers, employed B. at a small salary to sell goods for them, retail, on commission. He, however, without authority from them, pawned the goods with the defendant, who was a pawnbroker, and who received the goods in good faith and in the ordinary course of his business. In an action by the plaintiffs to recover the goods from the defendant:—*Held*, that B. was not a mercantile agent within the meaning of the Factors Act, 1889 (52 & 53 Vict. c. 45), and, therefore, that s. 2 of that Act afforded the defendant no protection. HASTINGS *v.* PEARSON - - 62

FIRE BRIGADE—Local authority—Control of premises where fire takes place - 673
See LOCAL GOVERNMENT. 3.

FISHERY ACTS—*Oysters—Close Time—Oysters taken in Foreign Waters and relaid in English Waters—Fisheries (Oyster, Crab, and Lobster) Act*, 1877 (40 & 41 *Vict. c.* 42), *s.* 4.] By s. 4 of the Fisheries (Oyster, Crab, and Lobster) Act, 1877, which imposes a penalty on persons selling oysters between May 14 and August 4, in any year, it is provided that a person shall not be guilty of an offence under the section if he satisfies the Court that the oysters "were taken within the waters of some foreign State."—The appellant was convicted of having sold oysters on a day within the period specified in the Act. It appeared that these oysters having been originally taken in French waters had been brought in a mature state to this country in February or March, and laid down for the purpose of storage at a depth of some fathoms in part of a creek used only for the reception of similar French oysters, where they did not breed, and from which they were dredged when required for sale during the close period:—*Held*, that the oysters were "taken within the waters of a foreign State," so as to be excluded from the operation of the Act, and that the conviction must therefore be quashed. ROBERTSON *v.* JOHNSON - - 129

2. —— *Fishery District—Definition of Limits by Secretary of State's Certificate—"Tributary" —Reservoir—Salmon Fishery Act*, 1865 (28 & 29 *Vict. c.* 121)—*Liverpool Corporation Waterworks Act*, 1880 (43 & 44 *Vict. c. cxliii.*).] By 28 & 29 Vict. c. 121, the limits of a river are to be defined, and a fishery district is to be formed, for the purposes of the Salmon Fishery Acts, by a Secretary of State's certificate describing the limits of the river and district, and by s. 3 "river" is to include "such portion of any stream with its tributaries" as may be declared in the certificate. In 1866 the fishery district of the River Severn was formed, and the Secretary of State's certificate defined the limits as being (inter alia) "so much of the River Severn and of the River Vyrnwy and of all other tributaries of the River Severn as is situate within the county of Montgomery"; in 1867 a second certificate further defined the limits as including (inter alia) "so much of the tributaries of the River Vyrnwy" as was in Montgomeryshire, and in 1882 a third certificate included in the district "all tributaries of the River Severn" in that county. In 1880 the corporation of Liverpool obtained an Act of Parliament, and in the exercise of the powers given by such Act constructed a reservoir by means of an embankment across the valley of the Vyrnwy for the purpose of supplying Liverpool with water; the Act authorized them to collect, divert, impound, and use all the waters of the Vyrnwy and all its tributary streams at and above the point at which the embankment of the reservoir crossed the river; but the corporation were, before using the water for their own purposes, to cause to flow and be discharged from the reservoir into the River Vyrnwy within forty chains of the foot of the embankment a regular, equal, constant, and daily supply of water, called the daily compensation water; additional monthly compensation water was also provided for. After the completion of the reservoir, the requirements of the Act as to the compensation water were duly complied with:—*Held*, that the reservoir was not a tributary of the River Severn within the meaning of the certificates, and was therefore not within the jurisdiction of the board of conservators of the Severn fishery district. GEORGE *v.* CARPENTER - - - - 505

FORFEITURE—Lease—Parties necessary on application for relief—Original lessee 604
See LANDLORD AND TENANT. 3.

FRANCHISE.
See PARLIAMENT—FRANCHISE.

FRAUDS, STATUTE OF—*Contract for Interest in Land—Debenture—Company—Assignment.*] A company incorporated under The Companies Act, 1862, issued debentures charging its undertaking and all its property, both present and future. The debentures contained the following conditions: that the charges thereby created should be a floating security, and that the company, until the appointment of a receiver or the commencement of a winding-up, should be at liberty in the course of its business to dispose of the property charged; that, in the event of the company making default in payment of the principal or interest secured by the debentures, or in the event of the winding-up of the company, the debenture-holders might appoint a receiver, and that such receiver should have power to sell the mortgaged property. A holder of certain of such debentures orally contracted for the sale and transfer of them to a purchaser. At the date of such contract the company was possessed of certain leasehold property:—*Held*, by Mathew, J., that the contract for the sale of the debentures was a contract for an interest in land within the 4th section of the Statute of Frauds. DRIVER *v.* BROAD. [*See next case.*] - - - 539

2. —— *Contract for Interest in Land—Debentures—Company—Assignment—"Floating Security."*] A company incorporated under the Companies Act, 1862, issued debentures charging its

FRAUDS, STATUTE OF—*continued.*
undertaking and all its property whatsoever and wheresoever, both present and future. The debentures contained the following conditions: that the charge thereby created should be a floating security, and the company, until the appointment of a receiver or the commencement of a winding-up, should be at liberty, in the ordinary course of its business, to dispose of the property charged; and that, in the event of the company making default in payment of the principal or interest secured by the debentures, or in the event of the winding-up of the company, the debenture-holders might appoint a receiver, who should have power to sell the mortgaged property. A holder of certain of such debentures orally contracted for the sale and transfer of them to a purchaser. At the dates both of the issue of the debentures and of such contract, the company was possessed of certain leasehold property:—*Held*, affirming the judgment of Mathew, J., that the contract for the sale of the debentures was a contract for an interest in land within the 4th section of the Statute of Frauds. DRIVER *v.* BROAD - - - C. A. 744

FRIENDLY SOCIETY—Bankruptcy—Debt due by bankrupt treasurer—Preferential payment - - - - 327
See BANKRUPTCY. 8.

GAME—*Excise Licence to deal in—Foreign Game*—23 *&* 24 *Vict. c.* 90, *s.* 14—24 *&* 25 *Vict. c.* 91, *s.* 17.] An excise licence to deal in game under 23 & 24 Vict. c. 90, s. 14, is not required to enable a person to deal here in game which has been killed abroad. PUDNEY *v.* ECCLES - - 52

GAMING—*Betting Agent—Payment of Bets by, on Principal's Account—Gaming Act*, 1892 (55 *&* 56 *Vict. c.* 9)—*Action commenced after passing of Act to recover Payments made before—Whether Act retrospective.*] The Gaming Act, 1892, s. 1, provides that "any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of 8 & 9 Vict. c. 109 . . . . shall be null and void, and no action shall be brought or maintained to recover any such sum of money."—The defendant employed the plaintiff, a betting agent, to make certain bets in his (the plaintiff's) name on the defendant's behalf. The bets having been made and lost, the plaintiff paid the amount of the losses on the defendant's account. This occurred prior to the passing of the Gaming Act, 1892. After the passing of the Act, the plaintiff commenced an action to recover from the defendant the money so paid:—*Held*, that, the Act was not retrospective, and that the action might be maintained. KNIGHT *v.* LEE - - - 41

2. —— *Money paid—Implied Contract*—8 *&* 9 *Vict. c.* 109—*The Gaming Act*, 1892 (55 *&* 56 *Vict. c.* 9), *s.* 1—*Money paid "in respect of" a Contract of Betting.*] The Gaming Act, 1892, s. 1, enacts that any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109, shall be null and void, and no action shall be brought or maintained to recover any such sum of money:—*Held*, that money paid by the plaintiff for the defendant at his request to persons with whom the defendant had lost bets was money paid "in respect of" a gaming contract within the meaning of the Gaming Act, 1892, and therefore that the plaintiff could not recover the sums so paid by him from the defendant. TATAM *v.* REEVE 44

GASWORKS — Recovery of gas rents — Bankruptcy—Receiving order - - 323
See BANKRUPTCY. 5.

GASWORKS CLAUSES ACTS—*Supply of Gas—Statutory obligation of Corporation to pay for Gas supplied to Public Lamps—Insufficient Supply—Pipes blocked in consequence of exceptional Frost—Richmond Gas Acts*, 1867 *and* 1881 (30 *&* 31 *Vict. c. c.*; 44 *&* 45 *Vict. c. xxxv.*)—*Gasworks Clauses Act*, 1871 (34 *&* 35 *Vict. c.* 41), *ss.* 24, 36.] By the Richmond Gas Acts, 1867 and 1881, with which were incorporated the Gasworks Clauses Acts, 1847 and 1871, the Richmond Gas Company were required to supply gas to the public lamps in the parish of Richmond, and the charge for supplying such gas was fixed at a certain annual sum per lamp—the lamps to be lighted from sunset to sunrise, and the burners used therein not to consume less than a certain amount per hour. During the months of December, 1890, and January, 1891, in consequence of exceptional frost, the pipes became blocked with ice, and the supply of gas to the public lamps was insufficient:—*Held*, that the corporation of Richmond were bound to pay the fixed annual sum in respect of such lamps, notwithstanding the insufficiency of the supply of gas. IN RE RICHMOND GAS COMPANY AND MAYOR, &C., OF BOROUGH OF RICHMOND (SURREY) - - - 56

HIGHWAY—*Trespass to Land—Use of Highway otherwise than as such—Practice—Declaratory Judgment.*] The defendant was the owner of a grouse moor crossed by a highway, the soil of which was vested in him. On the occasion of a grouse drive upon this moor, the plaintiff went upon the highway, not for the purpose of using it as a highway, but solely for the purpose of using it to interfere with the defendant's enjoyment of his right of shooting, by preventing the grouse from flying towards the butts occupied by the shooters. The defendant's keepers having forcibly prevented the plaintiff from such interference, he brought an action for assault against the defendant, in which the defendant justified on the ground that the plaintiff was a trespasser upon his land on the occasion in question, and by way of counter-claim asked for a declaration to that effect:—*Held*, that, inasmuch as the plaintiff was upon the highway for purposes other than its use as a highway, he was a trespasser; and, by Lopes, L.J., and Kay, L.J., Lord Esher, M.R., dissenting, that the Court ought to make a declaration to that effect. HARRISON *v.* DUKE OF RUTLAND - - - - C. A. 142

—— Urban authority—Surveyors of highways—Limitation of action - - 643
See LOCAL GOVERNMENT. 2.

INDECENT ASSAULT—Male under fourteen—Acquittal on charge of carnally knowing girl under thirteen - - - 320
See CRIMINAL LAW.

INFANT—*Apprenticeship Deed—Contract not for Benefit of Infant—Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *ss.* 5, 6.] An infant was apprenticed by a deed containing a provision that the masters should not be liable to pay wages to the apprentice so long as their business should be interrupted or impeded by or in consequence of any turn-out, and that the apprentice might during any such turn-out, and for such reasonable time thereafter as might be necessary for him to enable him to determine such employment as thereinafter mentioned, employ himself in any other manner or with any other person for his own benefit, and that in case the apprentice should elect so to employ himself the masters should not, during the time he should so employ himself, be bound to teach or instruct him:—*Held*, that this provision was so much to the detriment of the infant that the apprenticeship deed could not be enforced against him under the Employers and Workmen Act, 1875, ss. 5, 6.—*Mealkin* v. *Morris* (12 Q. B. D. 352) approved. CORN *v.* MATTHEWS [C. A. 310

INN.
See LICENSING ACTS.

INSPECTION—Property—Reference of matters in dispute in action - - - 545
See PRACTICE. 18.

INSURANCE — *Accident* — "*Injury caused by external means.*"] The plaintiff effected an insurance with the defendants against "any bodily injury caused by violent, accidental, external and visible means." The policy contained a proviso, excepting, among other things, injuries arising from "natural disease or weakness, or exhaustion consequent upon disease." In stooping to pick up a marble dropped by a child, the plaintiff dislocated the cartilage of his knee. Before the accident, the plaintiff had not suffered from any weakness of the knee or knee-joint. In an action to recover compensation under the policy:—*Held*, that the word "external" must be taken in contradistinction to the internal causes of injury, such as disease, mentioned in the proviso, and that, so reading the policy, the injury was caused by external means; that it was also caused by means that were violent, accidental and visible, and was covered by the policy. HAMLYN *v.* CROWN ACCIDENTAL INSURANCE COMPANY, LIMITED - - - - - C. A. 750

—— Offer by advertisement—Wager - 256
See CONTRACT.

INSURANCE, FIRE — *Lloyd's Fire Policy* — *Warranty—Condition precedent—Liability.*] The defendant and other underwriters subscribed a fire policy, which contained the following clause: "Warranted to be on same rate, terms, and identical interest as U. Insurance Company 800*l.* and G. Insurance Company 700*l.*" In the policy of one of the two companies the premium and also the interest insured differed from those in the defendant's policy:—*Held*, that the warranty must be taken to be a condition precedent; that the facts shewed that there had been a breach of such warranty; and that the policy was consequently void, and the defendant not liable. BARNARD *v.* FABER - - - C. A. 340

INSURANCE, MARINE — *Voyage — Commencement of Risk—Land Transit—Deviation Clause—Alteration.*] The plaintiffs, merchants at Bradford, effected an open policy of insurance with the defendants on merchandise, "as interest may appear or be hereafter declared," from the Mersey or London, to any port in Spain this side of Gibraltar, and thence by inland conveyance to any place in the interior of Spain. There was a marginal note providing that deviation or change of voyage, not included in the policy, was to be held covered at a premium to be arranged. The plaintiffs dispatched goods from Bradford to Madrid, expecting that they would be carried, as former consignments had been, to Seville, on this side of Gibraltar, and thence to Madrid; but they were, in fact, shipped on a vessel bound from Liverpool to Carthagena and other ports beyond Gibraltar, and the bills of lading were made out to Carthagena. The plaintiffs declared the goods under the policy, and told the insurance broker that the goods were going to Seville. The ship was lost before she touched at any port in Spain:—*Held*, affirming the decision of Wright, J., that the risk had never attached, for the voyage to Carthagena was not one of the voyages covered by the policy, and that the defendants were not liable. SIMON, ISRAEL & CO. *v.* SEDGWICK [C. A. 303

2. —— *Policy—Warranty—Average—Stranding—Goods in Lighters at time of Stranding of Ship—Construction of Valued Policy—Inclusion of Advanced Freight as part of Value of Goods.*] A cargo of maize was insured from San Nicolas and Buenos Ayres to a port in Europe; the subject-matter of the insurance was described in the policy to be "26,910 bags of maize from San Nicolas, 6065*l.* at 1 per cent.; 8299 bags of maize from Buenos Ayres, 1875*l.* at ¾ per cent."; and the policy contained a further statement that by agreement the goods were valued at "7940*l.* (included 1361*l.* 6*s.* 6*d.* for advance on freight)." The policy covered all risks in craft, and contained a warranty against particular average, unless the ship or craft should be stranded. The 26,910 bags were shipped at San Nicolas; but while on her way down the river to Buenos Ayres the ship was stranded; at that time the 8299 bags were in lighters in Buenos Ayres roads awaiting her arrival. Ultimately the ship was got off and proceeded to Buenos Ayres, where she was surveyed and found to be seaworthy; the cargo from San Nicolas (which had been taken out) was reshipped, the 8299 bags waiting in the lighters were put on board, and the ship proceeded on her voyage to Europe, in the course of which a large part of the cargo was damaged by water owing to perils of the seas. It was admitted that a claim for particular average in consequence of the stranding arose in respect of the bags shipped at San Nicolas; but the assured claimed to be entitled to recover also in respect of the bags shipped at Buenos Ayres; they further contended that the loss should be calculated upon the full 7940*l.* without any deduction in respect of freight

INSURANCE, MARINE—*continued.*
advanced.—*Held*, first, that, as at the time of the stranding of the ship the 8299 bags were only at risk in the craft and not at risk in the ship, the warranty attached, and the assured were not entitled to recover a particular average loss in respect of such bags; secondly, that the policy was to be treated as one policy upon valued goods, and not as a policy by which advanced freight was separately insured, and that therefore the particular average loss should be calculated upon the full amount of 7940*l.* THAMES AND MERSEY MARINE INSURANCE COMPANY *v.* PITTS, SON, & KING - - - - - - - 476

INTERROGATORIES—Setting aside or striking out - - - - - - 5
See PRACTICE. 8.

IRISH JUDGMENT—Enforcement by English Court—Judgment summons - 21
See JUDGMENT.

JUDGMENT—*Irish Judgment registered in England—Enforcement by English Court—Judgment Summons—"Execution"—Judgments Extension Act*, 1868 (31 & 32 *Vict. c.* 54), *ss.* 1, 4—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *ss.* 4, 5.] The Judgments Extension Act, 1868, provides by s. 1 for the registration of Irish judgments in England, and that from the date of registration such judgments shall be of the same force and effect, and all proceedings may be had and taken on them, as if they had been originally obtained or entered up on the date of registration in the Court in which they are so registered. By s. 4 the English Court is to have and exercise the same control and jurisdiction over any judgment registered under the Act in that Court as it "now" has and exercises over any judgment in its own Court; "but in so far only as relates to execution under this Act": —*Held*, that the procedure by judgment summons under the Debtors Act, 1869, is not "execution" of the judgment debt within the meaning of s. 4 of the Judgments Extension Act, 1868, and that the English Court has no jurisdiction to issue a judgment summons for the purpose of enforcing a registered Irish judgment. *In re* WATSON. *Ex parte* JOHNSTON. JOHNSTON *v.* WATSON [C. A. 21

—— Limitations - - - - 25, 189
See LIMITATIONS, STATUTE OF. 1, 2.

LAND TAX—Tithes—Exemption - - 251
See TITHES.

LANDLORD AND TENANT—*Breach of Covenant not to Assign without Licence—Measure of Damages.*] A lease contained a covenant that the lessee should not assign or sublet the premises, or any part of them, without the consent in writing of the lessor, his executors, administrators, or assigns; but that such consent should not be unreasonably or capriciously withheld to a responsible assignee or sub-tenant. The lessee, without applying for the consent of the lessor, sublet the premises to a person who intended, as he knew, to use them, and who did, in fact, use them as a turpentine distillery. The premises having been burnt down by a fire arising from the use of the premises for the business for which

LANDLORD AND TENANT—*continued.*
they were taken, an action was brought by the lessor for breach of covenant:—*Held*, that the loss caused by the fire was the natural result of the breach of covenant, and was, therefore, recoverable as damages in the action. LEPLA *v.* ROGERS - - - - - - 31

2. —— *Lease — Assignment of Underlease—Grant of Underlease—Title—Right to call for Lease of Assignor or Lessor—"Leasehold Reversion"—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 1; *s.* 13, *sub-s.* 1.] Under a contract to sell and assign a term of years derived out of a leasehold interest in land, or to grant a lease for a term of years to be derived out of a leasehold interest with a leasehold reversion, the intended assign or lessee has the right to call for the lease under which the intended assignor or lessor holds. GOSLING *v.* WOOLF - - - - - - 39

3. —— *Lease—Re-entry—Relief against Forfeiture — Parties necessary on Application for Relief—Original Lessee—The Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 1.] In an action of ejectment, brought under a proviso in a lease for re-entry for non-payment of rent, the lessor recovered judgment against the tenants in possession, and obtained possession of the demised premises. Subsequently mortgagees by way of underlease applied for relief against the forfeiture, under s. 1 of the Common Law Procedure Act, 1860, but did not make the original lessee a party in the application:—*Held*, that relief ought not to be given in the absence of the original lessee. HARE *v.* ELMS [604

4. —— *Tenant holding over after Expiration of Term—Tenancy from Year to Year—Implication of Law.*] Premises were let under an agreement in writing for a year from February 1, 1891, at a rent of 140*l.*, payable quarterly in advance on February 14, May 14, August 14, and November 14. After the expiration of the lease, the tenants remaining in possession, the landlord wrote to them on February 25, 1892, demanding 35*l.* for a quarter's rent due in advance. The tenants did not answer his letter, but remained in possession, and on March 26 they wrote to him to the effect that it was "their intention to discontinue their present tenancy, and that they gave him notice that they would not continue the same beyond the period required under their agreement, but that they would be glad if he could see his way to take up the premises on May 14, or even earlier":—*Held*, that, under the circumstances above mentioned, both parties must be taken to have consented to a continuance of the tenancy after the expiration of the lease, and, that being so, the implication was, in the absence of any evidence to rebut it, that there was a tenancy from year to year on the terms of the former lease so far as not inconsistent with such tenancy. DOUGAL *v.* MCCARTHY C. A. 736

LANDS CLAUSES ACTS—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 68, 85, 121—*Compensation—Procedure—Notice to Treat—Determination of Amount of Compensation by Justices—Interest greater than a Year at time of Notice to Treat, but less than a Year at time of*

LANDS CLAUSES ACTS—*continued.*

Requirement of Possession.] On May 14, 1891, a railway company, empowered by statute to make compulsory purchase of certain lands, served the lessee of part of such lands with notice to treat. At that time the lessee held under a thirty years' lease, which was terminable by the lessor under certain conditions by three months' notice. No further steps were taken by either party under the notice to treat; and on June 30, 1892, the lessor gave the lessee notice to terminate the tenancy at the expiration of three months. On July 20 the railway company required and took possession of the land under s. 85 of the Lands Clauses Consolidation Act, 1845, and took out a summons, to determine the amount of compensation due to the lessee, before a metropolitan magistrate under s. 121 of that Act, which enables justices to determine the amount of compensation when the land required is in the possession of any person "having no greater interest therein than as a tenant for a year or from year to year." The magistrate considered that he had no jurisdiction to entertain the matter on the ground that the value of the interest of the lessee in the land must be considered at the date of the notice to treat, and not at the date at which the land was actually required and taken:—*Held*, that since no proceedings had been taken under the notice to treat, the fact that it had been given was immaterial, and that the magistrate had therefore jurisdiction under s. 121 to determine the amount of compensation. THE QUEEN *v.* KENNEDY - - - - - 533

LIBEL—Privilege—Report of judicial proceedings—Ex parte application to magistrates for summons - - - 65
See DEFAMATION.

—— Embarrassing pleading - - 571
See PRACTICE. 25.

LICENSING ACTS—*Offences—Sale during Prohibited Hours—"Bonâ fide Traveller"—Refreshment on Sunday*—37 & 38 *Vict. c.* 49, *ss.* 9, 10.] The appellant was charged with selling beer on licensed premises during prohibited hours. The beer was sold to a railway porter, who early on Sunday morning walked from his house, where he had slept, to a railway station, and travelled thence by train to another station, where he was on duty during the first part of the day. During the interval between two trains he went for a walk to occupy his time, and visited the appellant's inn, where he was supplied with beer at about 9.45 on Sunday morning. The inn was more than three miles from his house:—*Held*, that the porter was a bonâ fide traveller, within the meaning of s. 10 of the Licensing Act, 1874, and therefore the appellant could not be convicted under s. 9 of selling beer during the time at which the premises were directed to be closed. COWAP *v.* ATHERTON - - - - 49

2. —— *Offences—Sale during Prohibited Hours—"Bonâ fide Traveller"—Refreshment on Sunday—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *ss.* 9, 10.] The appellant, a licensed victualler, was convicted of opening his premises for the sale of intoxicating liquors during prohibited hours on Sunday. It appeared that, between 10.44 and 11.20 in the morning, at least 131 persons entered

LICENSING ACTS—*continued.*

or left the yard of the appellant's premises, all but four or five of them having walked from N., a place from three and a quarter to three and a half miles distant, to the appellant's house. They did not, however, proceed farther, but returned to N. after taking beer and other refreshment. The refreshment was supplied in the yard, where tables and seats were laid out; the tables and seats were not in the yard on week-days, and extra waiters were employed on Sundays to attend to the customers. Each person was asked where he came from and where he slept the preceding night, and no one was supplied with more than one pint of beer, or was served twice; there was nothing disorderly in the conduct of the customers:—*Held*, by Lord Coleridge, C.J., Hawkins, Day, and Collins, JJ. (Cave, J., dissenting), that the evidence warranted the finding of the justices that the customers were not bonâ fide travellers, and that the appellant did not truly believe them to be such, and that the conviction was right. PENN *v.* ALEXANDER - 522

3. —— *Licence — Renewal — Objection on ground of Disorderly Character of House—Evidence of Convictions of Previous Tenants—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 26.] A notice of intention to oppose the renewal of a licence for the sale of intoxicating liquors stated as the ground of objection that the house in respect of which the licence was sought was of a disorderly character. It was admitted that the applicant was himself a man of good character; but, in support of the objection, evidence was tendered and admitted of three convictions against previous tenants for offences against the Licensing Acts. The justices refused the application for the renewal on the sole ground of the convictions of the previous tenants:—*Held*, that it was competent to shew that the house was of a disorderly character without making any charge against the character of the applicant or his management of the house, and that the evidence was properly admitted. THE QUEEN *v.* JUSTICES OF MISKIN HIGHER - - - - - 275

4. —— *Licence — Lapse of — Discretion of Justices to Refuse Transfer—Licensing Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19.] The tenant of a beerhouse which had been continuously licensed for the sale of beer to be consumed on the premises from a date prior to May 1, 1869, was convicted of permitting drunkenness on the premises, and in consequence of such conviction the justices at the general annual licensing meeting in August, 1891, refused to renew his licence, which in consequence expired on October 10, 1891. In the interval, on October 5, 1891, the tenant yielded up possession of the house to the respondent, who, on November 17, 1891, applied to the justices at special sessions for a transfer of the licence:—*Held*, that the licence was, at the date of such application, "in force" within the meaning of s. 19 of the Wine and Beerhouse Act, 1869, and that the justices' power of refusing the transfer was limited to the four grounds mentioned in s. 8 of that Act. MURRAY *v.* FREER. [*See next case*] - - - - 281

LICENSING ACTS—*continued.*

5. —— *Licence—Lapse—Discretion of Justices to Refuse Transfer—Licensing Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19.] The tenant of a beerhouse which had been continuously licensed for the sale of beer to be consumed on the premises from a date prior to May 1, 1869, was convicted of permitting drunkenness on the premises, and in consequence of the conviction the justices, at the general annual licensing meeting in August, 1891, refused to renew the licence, which accordingly expired on October 10, 1891. On October 5, 1891, the tenant yielded up possession of the house to the respondent, who, on November 17, 1891, applied to the justices at special sessions for a transfer of the licence:—*Held*, that, at the date of the application, the licence was not "in force" within the meaning of s. 19 of the Wine and Beerhouse Act, 1869, and that, consequently, the justices' power of refusing the transfer was not limited to the four grounds mentioned in s. 8 of that Act.—Decision of Queen's Bench Division ([1893] 1 Q. B. 281) reversed. MURRAY *v.* FREER - **C. A. 635**

6. —— *Offences—"Illegally Dealing in Intoxicating Liquors"—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 17.] By s. 17 of the Licensing Act, 1874, power is given to a justice, on being satisfied that intoxicating liquor is being sold by retail, or exposed, or kept for sale on unlicensed premises, to grant a warrant by virtue of which a constable may enter the premises and search for, seize, and remove intoxicating liquor which there is reasonable ground to suppose is kept there for the purpose of unlawful sale; and it is further provided, that "when a constable has entered any premises in pursuance of any such warrant as is mentioned in this section, and has seized and removed such liquor as aforesaid, any person found at the time on the premises shall, until the contrary is proved, be deemed to have been on such premises for the purpose of illegally dealing in intoxicating liquor, and be liable to a penalty not exceeding forty shillings":—*Held*, that the expression "illegally dealing" must be taken to include the purchasing as well as the selling of intoxicating liquor upon unlicensed premises, and that a person so purchasing liquor is guilty of an offence under the above section. MCKENZIE *v.* DAY - - - - - **289**

LIMITATIONS — Action — Surveyors of Highways - - - - - - **643**
See LOCAL GOVERNMENT. 2.

LIMITATIONS, STATUTE OF—"*Judgment*"—3 & 4 *Wm.* 4, *c.* 27, *s.* 40—3 & 4 *Wm.* 4, *c.* 42, *s.* 3—27 & 28 *Vict. c.* 112, *s.* 1—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Order XVII., r.* 4.] By s. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57): "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." *Held*, that the expression "judgment" in s. 8 of the Real Property Limitation Act, 1874, refers to judgments generally and is not restricted to judgments which operate as charges upon land. *Hebblethwaite* v. *Peever* ([1892] 1 Q. B. 124) and *Watson* v. *Birch* (15 Sim. 523) followed. JAY *v.* JOHNSTONE. [*See next case*] - - - - - - **25**

2. —— "*Judgment*"—3 & 4 *Wm.* 4, *c.* 27, *s.* 40—3 & 4 *Wm.* 4, *c.* 42, *s.* 3—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Order XVII., r.* 4.] By s. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57): "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same":—*Held*, affirming the decision of the Queen's Bench Division, that the expression "judgment" in s. 8 of the Real Property Limitation Act, 1874, refers to judgments generally, and is not restricted to judgments which operate as charges upon land. *Watson* v. *Birch* (16 Sim. 523) followed. JAY *v.* JOHNSTONE - **C. A. 189**

LIVERPOOL COURT OF PASSAGE—*Admiralty Jurisdiction—Rules for regulating Practice and Procedure—Rule empowering Registrar to give Summary Judgment—Invalidity—Prohibition*—31 & 32 *Vict. c.* 71, *ss.* 10, 13, 23, 25—32 & 33 *Vict. c.* 51, *ss.* 1, 6.] In an Admiralty action in rem, brought in the Liverpool Court of Passage to recover wages, the registrar gave judgment for the plaintiffs, under a rule made by the assessor of the court, containing provisions similar to those of Order XIV. of the Rules of Supreme Court, 1883, and applying to Admiralty actions in rem, and giving the registrar power to enter judgment. On an application for a prohibition;—*Held*, that, as the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71) (which by s. 25 gives Admiralty jurisdiction to the Court of Passage), and the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), are, by s. 1 of the later Act, to be read as one Act, and, as, by ss. 10, 13, and 23 of the earlier Act, jurisdiction to determine causes is conferred on the judge alone, the assessor had not power, under s. 6 of the later Act, to confer jurisdiction on the registrar to hear and determine the cause, and therefore the rule was invalid, and a prohibition must be granted. FELLOWS *v.* OWNERS OF THE "LORD STANLEY" - - - - - - **98**

LOCAL GOVERNMENT—*By-laws—New Building—Deposit of Plan—Deviation from Plan.*] By one of the by-laws of an urban sanitary authority, made under s. 157 of the Public Health Act, 1875, every person intending to erect a building was required to give to the sanitary authority notice in writing of such intention, and at the same time to deliver or send to the clerk or surveyor complete plans and sections of every floor of the intended building, shewing the position, form, and dimensions of the several parts of the building. Another by-law em-

LOCAL GOVERNMENT—*continued.*

powered the sanitary authority to remove, alter, or pull down work done in contravention of any by-law relating to new buildings; but there was no by-law directed against persons building contrary to deposited plans. The respondent gave notice to the urban sanitary authority of his intention to build a house, and sent in plans, which were approved. During the progress of the building he made substantial alterations or deviations from the plans, which chiefly consisted in diminishing the height of certain of the floors; but such alterations did not contravene any of the by-laws, there being no by-law regulating the height of rooms in new buildings. The respondent was summoned on a charge of erecting a building without sending in complete plans and sections of every floor as required by the by-laws. The justices dismissed the summons:—*Held*, that as the erection of the building was no longer proceeding in accordance with the deposited plans, the respondent was bound to send in fresh plans in accordance with the change in his intention, and, having omitted to do so, was liable to be convicted. JAMES *v.* MASTERS - - - - - 355

2. —— *Practice — Limitation of Action — Urban Authority—Surveyors of Highways under Local Act*—5 & 6 *Wm.* 4, *c.* 50 (*Highway Act*, 1835), *s.* 109—38 & 39 *Vict. c.* 55 (*Public Health Act*, 1875), *ss.* 144, 264.] By a local Act passed in 1853 the corporation of Newcastle-upon-Tyne were constituted surveyors of highways within the borough, with all the powers and authorities and subject to all the liabilities of surveyors of highways under the laws for the time being in force. By s. 109 of the Highway Act, 1835, the period within which any action may be brought for anything done under the authority of that Act is limited to three months after the fact committed for which the action is brought. By s. 144 of the Public Health Act, 1875, urban authorities (including by s. 6 corporations of boroughs) are constituted surveyors of highways within their district, and are to have, exercise, and be subject to all the powers, authorities, duties, and liabilities (so far as the same are not inconsistent with the provisions of that Act) of surveyors of highways under the law for the time being in force. By s. 264 the period within which an action may be brought for anything done under the provisions of that Act is limited to six months after the accruing of the cause of action.—In an action against the corporation for negligence, as surveyors of highways, commenced more than three but less than six months after the cause of action accrued:—*Held*, that the defendants, as surveyors of highways, were entitled to rely on the limitation of three months provided by s. 109 of the Highway Act, 1835, and therefore that the action could not be maintained.—*Burton* v. *Mayor and Corporation of Salford* (11 Q. B. D. 286) approved.—*Taylor* v. *Meltham Local Board* (47 L. J. (C.P.) 12) and *Kay* v. *Atherton Local Board* (42 J. P. 792) overruled. GRAHAM *v.* MAYOR, &c., OF NEWCASTLE-UPON-TYNE - C. A. 643

3. —— *Local Authority — Powers — Fire Brigade—Control of Premises where Fire takes place—Right to Exclude the Public—Town Police Clauses Act*, 1847 (10 & 11 *Vict. c.* 89), *s.* 32—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 171.] By s. 171 of the Public Health Act, 1875, incorporating s. 32 of the Town Police Clauses Act, 1847, an urban authority "may employ a proper number of persons to act as firemen, and may make such rules for their regulation as they think proper."—The respondent, a member of a fire brigade provided by an urban authority, was instructed by his foreman to exclude all persons from certain premises, where the brigade was engaged in extinguishing a fire. He refused admission to the appellant, a member of a volunteer fire brigade, who thereupon endeavoured to force an entrance, and in so doing assaulted the respondent:—*Held*, that the effect of the statutes was to give to the brigade provided by the urban authority control over the premises, that the appellant was lawfully excluded, and could not justify his attempt to force an entrance, and therefore was rightly convicted of an assault. CARTER *v.* THOMAS - - 673

4. —— *Offences—Unwholesome Meat—Refusal of Justice to Condemn—Costs incurred by Owner of Meat in resisting Condemnation—"Full Compensation"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117, 308.] Although the owner of meat which has been seized by an inspector and brought before a justice for condemnation under ss. 116 and 117 of the Public Health Act, 1875, is not entitled as of right to attend and give evidence in defence of the meat, the justice may, if he thinks fit, hear evidence tendered by such owner in that behalf, and if, after so doing, the justice should refuse to condemn the meat, the full compensation which the owner may be awarded under s. 308 will include the costs which he has reasonably incurred in resisting the condemnation of the meat.—Meat belonging to the appellant was seized by one of the respondents' inspectors under s. 116 of the Public Health Act, 1875, and carried before a justice. The appellant attended and brought evidence to shew that the meat was sound. The justice, after hearing this evidence, refused to condemn the meat. The appellant, however, declined to receive it back. Proceedings having been taken under s. 308 to ascertain by arbitration the amount of compensation due to the appellant, the arbitrators stated a case for the opinion of the Court:—*Held*, that the appellant was not entitled to refuse to take back the meat, and could only recover the damage sustained by it in consequence of the seizure; but that he was entitled to be repaid the costs reasonably incurred by him in attending before the justice and resisting the condemnation of the meat. IN RE BATER AND MAYOR, &c., OF BIRKENHEAD - - 679

5. —— *Sewers—Vesting in Local Authority—Private Street, Sewer in—Acceptance by Local Authority of incomplete Sewer—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, 15, 150.] The owners of a building estate, who were the predecessors in title of the defendant, deposited plans, which were approved by the local authority, shewing a road running down the slope of a hill and crossing the New River at the foot, with a sewer running the whole length of the road

LOCAL GOVERNMENT—*continued.*

and crossing the New River to join another sewer on the farther side. An agreement was made by the New River Company with the estate owners to divert the New River so as to enable the sewer to be laid across the old bed of the stream. In 1885 the sewer was made as far as the New River, where it stopped, the river not having then been diverted; it had no outfall, and was never, in fact, used as a sewer; but the work was from time to time inspected by a servant of the local authority, who authorized the covering in of the various sections, and made reports to the local authority, who never expressed dissatisfaction with the work. Nothing more was done to the sewer, which became out of repair and ruinous; and in 1890 the local authority gave to the frontagers in the road notice, under s. 150 of the Public Health Act, 1875, to sewer the road down to the New River; on their default the local authority themselves constructed a new sewer, which they carried across the bed of the New River and connected with the sewer on the other side, the diversion of the river having been completed during the execution of the works by the local authority. The local authority having sought to charge the frontagers with the expenses of making the new sewer, the question of the amount to be paid by the defendant was referred to arbitration, and in an action on the award the jury found that the local authority had accepted the old sewer as a satisfactory sewer:—*Held*, that the local authority had power to accept the original sewer, although it had no outfall, and was at the time of acceptance incapable of being used as a sewer; and that, the road having once been sewered to the satisfaction of the local authority, the expenses of constructing the new sewer were not chargeable on the frontagers. HORNSEY LOCAL BOARD *v.* DAVIS - **C. A. 756**

LODGER — Parliament—Franchise—Declaration —Mistake—Power of amendment **121**
See PARLIAMENT—FRANCHISE.

MANSLAUGHTER—Neglect to provide food or medical attendance for person of full age - - - - - **450**
See CRIMINAL LAW. 2.

MASTER AND SERVANT—*Negligence—Servant lent to perform Particular Services—Master parting with Control over Servant—Control of Hirer—Non-liability of Master for Negligence of Servant.*] The defendants contracted to lend to a firm who were engaged in loading a ship at their wharf a crane with a man in charge of it. The man in charge of the crane received directions from the firm or their servants as to the working of the crane, and the defendants had no control in the matter. The plaintiff, who was a servant of the wharfingers and was employed by them to direct the working of the crane, sustained an injury through being struck by it by reason of the negligence of the man in charge, and sued the defendants on the ground that the negligence was the act of their servant:—*Held*, that, though the man in charge of the crane remained the general servant of the defendants, yet, as they had parted with the power of controlling him

MASTER AND SERVANT—*continued.*

with regard to the matter on which he was engaged, they were not liable for his negligence while so employed. DONOVAN *v.* LAING, WHARTON, AND DOWN CONSTRUCTION SYNDICATE **C. A. 629**

MAYOR'S COURT — *Practice — Certiorari — Removal of Action—Borough and Local Courts of Record Act*, 1872 (35 & 36 *Vict. c.* 86), *Sched. clause* 12.] By clause 12 of the schedule to the Borough and Local Courts of Record Act, 1872 (which was applied to the Mayor's Court by Order in Council): "No action entered in the Court shall before judgment be removed or removable from the Court into any superior Court by any writ or process, except by leave of a judge of one of the superior Courts in cases which shall appear to such judge fit to be tried in one of the superior Courts . . . .":—*Held*, that the clause imposed a limitation on the previous right of a defendant to have an action removed into the superior Court under the Mayor's Court Act, 1857 (20 & 21 Vict. c. clvii.), and gave power to the judge in the exercise of his discretion to order the removal of any such action, but subject to the condition precedent that the judge should first be satisfied that the action was fit to be tried in the superior Court.—The expression "case fit to be tried in the superior Courts" must be taken to mean a case which "ought" to be tried there, or which is "more fit" to be tried there than in an inferior Court. BANKS *v.* HOLLINGSWORTH **[C. A. 442**

MEDICAL PRACTITIONER — *Penalty — Practising without Certificate—Attendance on several Patients—Whether more than one Penalty Recoverable—"Act or Practise as an Apothecary"—"Every such offence"—Apothecaries Act*, 1815 (55 *Geo.* 3, *c.* 194), *s.* 20.] By the Apothecaries Act, 1815 (55 Geo. 3, c. 194), s. 20, any person who shall "act or practise as an apothecary" without a certificate is liable to a penalty "for every such offence."—The defendant practised as an apothecary without a certificate, and gave medical advice and supplied medicine to three different persons at different times on the same day. He was sued for three penalties. *Held*, that the words "act or practise as an apothecary" were directed against an habitual or continuous course of conduct, and the defendant was not guilty of a separate offence in attending each of the three persons, and was only liable to one penalty. THE APOTHECARIES COMPANY *v.* JONES - - - - - - **89**

METROPOLIS—*Building Acts—Building erected without Notice—Proceeding by District Surveyor after completion of Building — Metropolitan Building Act*, 1855 (18 & 19 *Vict. c.* 122), *ss.* 45, 46, 47, 105.] By s. 45 of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), if in erecting any building, anything is done contrary to the rules of the Act, power is given to the district surveyor to give "the builder engaged in erecting such building" notice to cause anything done contrary to the rules of the Act to be amended; and, by s. 46, if the builder to whom such notice is given makes default in complying with such notice, a magistrate may, on the application of the surveyor, make an order requiring him to comply with it.—By s. 105: "In cases

METROPOLIS—*continued.*
where any building has been erected . . . without due notice to the district surveyor . . . the time during which the district surveyor may take any proceeding or do anything authorized or required by this Act to be done by him in respect of such building . . . shall begin to run from the date of his discovering that such building has been erected."—After the completion of a building, which had been erected without due notice to and without the knowledge of the district surveyor, he discovered that it infringed the rules of the Act. He thereupon served the builder who had erected the building with notice under s. 45, calling upon him to render the building conformable to the rules of the Act, and, upon his failing to comply with this notice, he obtained from a magistrate, under s. 46, an order requiring him to do so:—*Held*, that ss. 45 and 46 only applied while the building was in course of erection, and that s. 105 did not enable the surveyor to take any proceeding under these sections when the building had been completed. SMITH *v.* LEGG - - - - - - - **398**

2. —— *Obstruction of Streets—Costermongers—Statute—Construction—Repeal by Implication—57 Geo. 3, c. xxix. s. 65—The Metropolitan Streets Act*, 1867 (30 & 31 *Vict. c.* 134), *s. 6—The Metropolitan Streets Act Amendment Act*, 1867 (31 & 32 *Vict. c.* 5, *s.* 1.] Sect. 65 of 57 Geo. 3, c. xxix., which empowered vestries in the metropolis to take certain summary proceedings against persons placing stalls and goods upon the carriage-ways or footways in streets or public places, is impliedly repealed, with respect to costermongers, by the operation of the Metropolitan Streets Act, 1867, s. 6, and the Metropolitan Streets Act Amendment Act, 1867, s. 1. SUMMERS *v.* HOLBORN DISTRICT BOARD OF WORKS - - - **612**

3. —— *Police Acts—Jurisdiction of Magistrate—Street Musician—Non-payment of Penalty—Imprisonment in Default—2 & 3 Vict. c.* 47, *s.* 77—27 & 28 *Vict. c.* 55, *s.* 1.] By 2 & 3 Vict. c. 47 (The Metropolitan Police Act, 1839), s. 57, any householder might require a street musician to depart from the neighbourhood of his house for reasonable cause, and every person who played on a musical instrument in a thoroughfare near any house, after being so required to depart, was made liable to a penalty of not more than forty shillings. By s. 77, in case of the non-payment of a pecuniary penalty imposed under the Act, the magistrate might commit the offender to prison for not more than one month where the fine did not exceed five pounds; the imprisonment to cease on payment of the sum due.—By 27 & 28 Vict. c. 55, s. 1 (The Street Music Act, 1864), s. 57 of 2 & 3 Vict. c. 47, was repealed, "and in lieu thereof the following provision shall take effect as part of the said Act." The offence was then described in similar language, and the offender made liable to a penalty of not more than forty shillings, or, in the discretion of the magistrate, to imprisonment for any time not exceeding three days.—A street musician was convicted under 27 & 28 Vict. c. 55, s. 1, and was sentenced to pay a fine of forty shillings, and in default of payment to be imprisoned for a month:—*Held*, that 27 & 28 Vict. c. 55, did not operate to impliedly repeal s. 77 of the earlier Act; that the penalty was, therefore, capable of being enforced by imprisonment as provided by that section, and the conviction was good. THE QUEEN *v.* HOPKINS - - **621**

MINE—*Wages—Payment by Weight of Mineral—Special Agreement for Deductions, Validity of—Contract—Illegal Stipulation, effect of, where Good Consideration for Contract—Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 58), *s.* 12.] By s. 12 of the Coal Mines Regulation Act, 1887, where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten—provided that nothing in this section shall preclude the owner of the mine from agreeing with the persons employed that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, such deductions being determined in such special mode as may be agreed upon between the owner and the persons employed. The appellant was employed by the respondents at their colliery upon the terms that he should be paid wages according to the weight of coal gotten by him; that he should not leave his employment without giving fourteen days' notice, and that deductions should be made in respect of dirt sent up to the surface with the coal; and the following special mode of determining those deductions was agreed upon between the respondents and the persons employed by them:—About one tub in twenty sent up to the surface was selected at random for testing. The dirt in that tub was separated from the coal and weighed, and if the tub contained more than a certain weight of dirt, the man who sent it up was not paid anything in respect of the coal therein. The men sending up the other nineteen tubs were paid on the total weight of the contents of each tub as though it contained coal only:—*Held*, that the proviso in s. 12 was controlled by the first part of that section, and did not authorize any agreement by which a person employed was not to be paid on the weight of the coal in a particular tub; that the agreement with respect to the special mode of making deductions for dirt was therefore illegal, but that the illegality in that respect did not vitiate the whole contract of employment so as to justify the appellant in leaving without giving fourteen days' notice. KEARNEY *v.* WHITEHAVEN COLLIERY COMPANY **C. A. 700**

MORTGAGE—Surveyor — Certificate as to progress of buildings—Untrue statement—Breach of duty—Negligence - **491**
See NEGLIGENCE.

MUTUAL DEALINGS—Claim to set off debt for past services against claim of trustee
See BANKRUPTCY. 2, 3. **[175, 455**

NEGLIGENCE—*Surveyor—Mortgage—Certificate as to Progress of Buildings—Untrue Statement—Breach of Duty—Liability of Surveyor to Mortgagee in absence of Contract or Fraud—Action of Deceit.*] Mortgagees of the interest of a builder

NEGLIGENCE—*continued.*
under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mortgagees, and there was no contractual relation between him and them. In consequence of the negligence of the surveyor the certificates contained untrue statements as to the progress of the buildings, but there was no fraud on his part:—*Held*, that the surveyor owed no duty to the mortgagees to exercise care in giving his certificates, and they could not maintain an action against him by reason of negligence.—*Derry* v. *Peek* (14 App. Cas. 337) considered.—*Heaven* v. *Pender* (11 Q. B. D. 503) distinguished.—*Cann* v. *Wilson* (39 Ch. D. 39) overruled. LE LIEVRE *v.* GOULD - - - - C. A. 491

—— Master and servant—Master parting with control over servant - - 629
See MASTER AND SERVANT.

—— Railway company—Robbery of passengers—Refusal to detain train—Overcrowding of carriage—Damages, remoteness of
See RAILWAY. [459

NOTICE OF TRIAL—Reply—Close of pleadings
See PRACTICE. 10. [519

OYSTERS—Close time—Oysters taken in foreign waters and relaid in English waters
See FISHERY ACTS. [129

PARLIAMENT—ELECTION PETITION—*Amendment—Leave of High Court—Judge not on the Rota for the Trial of Election Petitions—Ex parte Application—Corrupt and Illegal Practices Prevention Act*, 1883 (46 & 47 *Vict. c.* 51), *ss.* 40, 56.] A judge of the High Court who is not for the time being on the rota for the trial of election petitions has no jurisdiction to grant leave, under s. 40 of the Corrupt and Illegal Practices Prevention Act, 1883, to amend an election petition. Such leave ought not to be granted upon an ex parte application. SHAW *v.* RECKITT - 779

2. —— *Change of Venue—"Special Circumstances"—Parliamentary Elections Act*, 1868 (31 & 32 *Vict. c.* 125), *s.* 11, *sub-s.* 11.] The existence of special circumstances which render it desirable that the petition should be tried elsewhere than in the borough or county in which the election took place is a condition precedent to the power to change the place of trial of a parliamentary election petition from such borough or county, and the fact that the inquiry is of such a nature that the trial can be more cheaply and conveniently held elsewhere does not constitute such special circumstances. LAWSON *v.* CHESTER MASTER - - - - - 245

3. —— *Particulars—Scrutiny—Claim of Seat—Election Petition Rules*, 1868, *rr.* 6, 7.] By r. 6 of the Election Petition Rules, 1868, "Evidence need not be stated in the petition, but the Court or a judge may order such particulars as may be necessary to prevent surprise and unnecessary expense, and to insure a fair and effectual trial in the same way as in ordinary proceedings in the Court of Common Pleas, and upon such terms as to costs and otherwise as may be ordered."—By r. 7, "When a petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, the party complaining of or defending the election or return shall, six days before the day appointed for trial, deliver to the master, and also at the address, if any, given by the petitioners and respondent, as the case may be, a list of the votes intended to be objected to, and of the heads of objection to each such vote . . . . and no evidence shall be given against the validity of any vote, nor upon any head of objection not specified in the list, except by leave of the Court or judge . . . ."—An election petition, after alleging the election to be void in consequence of various corrupt and illegal practices on the part of the agents of the sitting member, proceeded to claim the seat for the petitioner upon a scrutiny, upon the ground that he had a majority of lawful votes:—*Held*, that r. 7 was exclusive of r. 6, and was alone applicable to the delivery of particulars under that part of the petition which claimed the seat, and that the Court had therefore no jurisdiction to order particulars other than those specified in the rule, or to enlarge the time for their delivery.—*Elkins* v. *Onslow: the Guildford Petition* (19 L. T. (N.S.) 528), distinguished. MUNRO *v.* BALFOUR - 113

4. —— *Particulars—Time for Delivery—Election Petition Rules*, 1868, *r.* 6.] By r. 6 of the Election Petition Rules, 1868, particulars may be ordered of the charges contained in an election petition:—*Held*, that there is no inflexible rule of practice as to the period before the day appointed for trial at which such particulars must be delivered; the time to be fixed for their delivery must depend upon the particular circumstances of each case.—*Lenham* v. *Barber* (*The Hereford Municipal Election Petition*) (10 Q. B. D. 293) distinguished. RUSHMERE *v.* ISAACSON - - - - - 118

PARLIAMENT—FRANCHISE—*Registration—Lodger Claim—Declaration—Mistake—Power of Amendment—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-ss.* 2, 13.] A lodger claimed to be placed on the list of parliamentary voters in respect of the sole use of a bedroom and the joint use of a sitting-room with the landlord; the declaration annexed to the claim stating that he had occupied the lodgings partly as sole tenant and partly as joint tenant, and that the lodgings were of the clear yearly value, if let unfurnished, of 10*l.* or upwards. The revising barrister, being satisfied upon the evidence that the occupation of the bedroom alone was of the value of 10*l.*, amended both claim and declaration by striking out all reference to the joint tenancy:—*Held*, that the description of the qualification was a "mistake" which the revising barrister had power to amend under s. 28, sub-s. 2, of the Parliamentary and Municipal Registration Act, 1878. THE QUEEN *v.* MCKELLAR - - - - - 121

2. —— *Registration—County Vote—Notice of Objection—Description of Place of Abode of Objector—Registration Order*, 1889, *Forms* 5 (*a*) (*b*) *and I., No.* 2.] Notices of objection to certain county voters were signed "J. B., of Burnard's

PARLIAMENT—FRANCHISE—*continued.*
Terrace, on the register of electors for the township of Bodmin Borough." The revising barrister found as a fact that no one had been misled or inconvenienced by reason of the notices omitting to state the name of the town in which the said terrace was situate:—*Held*, that the place of abode of the objector was sufficiently described under the Registration Order, 1889, Forms 5 (*a*) (*b*). HICKS *v.* STOKES - - - 124

3. —— *Registration—Objection to Name being on List of Voters—Qualification of Objector—Objector's Name struck off List before Objection heard*—6 & 7 *Vict. c.* 18, *s.* 17.] By s. 17 of 6 & 7 Vict. c. 18: "Every person whose name shall have been inserted in any list of voters for any city or borough may object to any other person as not having been entitled on the (15th) day of July next preceding to have his name inserted in any list of voters for the same city or borough, and every person so objecting" shall give notice of objection as therein prescribed:—*Held*, that, under this section, an objector is qualified for the purposes of his objection if his name was, at the time of service of notice of his objection, upon any of the lists of voters prepared by the overseers, even though before such objection is heard his name has been struck off such list by the revising barrister. PEASE *v.* TOWN CLERK OF MIDDLESBROUGH - - - 127

PARTICULARS—Election petition—Scrutiny—Claim of seat - - - 113
See PARLIAMENT—ELECTION PETITION. 3.

—— Election petition—Time for delivery 118
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—— Order for particulars—Terms on which order can be made - - - 185
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PARTIES—Misjoinder of plaintiffs—Action for slander - - - - 771
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—— Non-joinder of defendants—Foreigner resident out of jurisdiction—Application to add defendant - - - 422
See PRACTICE. 13.

—— Non-joinder of plaintiffs—Action for damage to reversion - - - 665
See PRACTICE. 14.

—— Persons having the same interest in one cause or matter—Suing one of a number of persons on behalf of all—Trade union
See PRACTICE. 16. [435

—— Persons having the same interest in one cause or matter—Order authorizing one or more to defend on behalf of all—Power to make order against the will of the defendant - - - 775
See PRACTICE. 15.

PAUPER—Application for leave to appeal in formâ pauperis—Court of Appeal 417
See PRACTICE.

PENALTY—Action—Separate offence - 89
See MEDICAL PRACTITIONER.

PETITION—Bankruptcy - - - 590
See BANKRUPTCY. 7.

PHARMACY ACTS—*Sale of Poisons—Medicine containing a Scheduled Poison—Patent Medicine—Pharmacy Act*, 1868 (31 & 32 *Vict. c.* 121), *ss.* 1, 15, 16, 17.] By s. 15 of the Pharmacy Act, 1868, any person who sells or keeps an open shop for the retailing, dispensing, or compounding poisons, not being a duly registered pharmaceutical chemist or chemist and druggist, is made liable to a penalty of 5*l.*; by s. 2 the articles described in Schedule A are to be deemed poisons within the meaning of the Act, the schedule including (inter alia) opium and all preparations of opium; by s. 16 nothing in the Act is to interfere with the dealing in patent medicines.—The defendants, a firm of grocers, sold a bottle of a proprietary medicine, called chlorodyne, in the ordinary course of their business. Chlorodyne was not protected by letters patent, but was admitted to be a useful medicine. Evidence was given that the bottle contained one grain of morphine, the active principle of opium, and that eight-tenths of a grain had been known to prove fatal to an adult:—*Held*, that the prohibition in the Act against the sale of poisons by other than registered chemists was not confined to the sale of the scheduled poisons in their simple state or of the preparations of such poisons, but extended to the sale of a compound containing a scheduled poison as one of its ingredients, and that chlorodyne was a poison within the meaning of the Act:—*Held*, further, that the exception in s. 16 in favour of patent medicines extended only to medicines which were the subject of letters patent and not to proprietary medicines. PHARMACEUTICAL SOCIETY *v.* PIPER & CO. - 686

POISON—Sale of—Patent medicine - 686
See PHARMACY ACTS.

POOR RATE—*Rateable Value—Beneficial Occupation—Hypothetical Tenant—Sewage Works—Pumping Station—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 135, 150—*Metropolis Management Amendment Act*, 1858 (21 & 22 *Vict. c.* 104), *ss.* 1, 3, 23—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 40, *sub-ss.* 8, 9; *s.* 65.] The Metropolitan Board of Works, under their statutory powers, erected on land which they acquired for the purpose sewage deodorizing works and a pumping-station, as part of the main drainage system of the metropolis. By the Local Government Act, 1888, s. 40, sub-s. 8, the powers, liabilities and property of the board were transferred to the London County Council. The sewage works and the pumping-station were rated to the poor-rate of the parishes in which they were respectively situated. Upon appeals against the rate, special cases were stated by quarter sessions for the opinion of the Court. The case relating to the sewage works stated that the county council did not derive any pecuniary profit from the premises, and that the works were maintained by them under statutory provisions; that the county council were the only possible tenants of the premises so long as they remained part of the metropolitan system, and that, if the premises belonged to a private owner, he would let, and the county council would hire, them for the purpose of being used in connection with and as part of the metropolitan system at a yearly rent sufficient to support the gross and rateable

POOR RATE—*continued.*
values of 20,567*l.* and 17,139*l.* respectively; but that, if the premises were not used in connection with and as part of the metropolitan system, but were entirely disconnected therefrom and applied to any other use for which they could be made available, the gross value would be 1200*l.* and the rateable value 1000*l.*—The case relating to the pumping-station contained similar statements, and the quarter sessions found that, if the premises were not used for the main drainage, but were disconnected therefrom and in the hands of a tenant who applied them to any other use for which they might be made available, and the county council were not taken into consideration as possible tenants, the gross value of the premises would be 1597*l.* and the rateable value 1318*l.*:—*Held*, by the Court of Appeal, in both cases, that the principle of *London County Council* v. *Overseers of West Ham* ([1892] 2 Q. B. 44) applied; that the county council could not be taken into consideration as hypothetical tenants; and that, for the purpose of rating, the premises must be assessed with reference to their value if they were not used in connection with the main drainage system, but were occupied for any other purpose for which they might be made available. LONDON COUNTY COUNCIL *v.* ASSESSMENT COMMITTEE OF WOOLWICH UNION. LONDON COUNTY COUNCIL *v.* ASSESSMENT COMMITTEE OF ST. GEORGE'S UNION - - - **C. A. 210**

2. —— *Exemptions—Crown Property—Servants of the Crown—Occupation for Crown Purposes—Volunteer Corps—Storehouse for Arms—Volunteer Act*, 1863 (26 & 27 *Vict. c.* 65), *s.* 26.] Premises occupied by a volunteer corps for the purpose of the service of the corps, and being reasonably necessary for such service, are occupied by servants of the Crown for the purposes of the Crown, and, therefore, are exempt from rates.—Therefore, premises occupied by the commanding officer of a volunteer corps for the purpose of the service of the corps, and being reasonably necessary for such service, are exempt from rates, including both such part of the premises as is a storehouse for the depositing and safe keeping of arms, ammunition, and stores, within the meaning of s. 26 of the Volunteer Act, 1863, and, therefore, exempted from rates by that section, and all such other parts of the premises as are reasonably necessary for the service of the corps. PEARSON *v.* ASSESSMENT COMMITTEE OF HOLBORN UNION - - - - - - **389**

PRACTICE — *Appeal — Jurisdiction of Court of Appeal — Application for Leave to Appeal in Formâ Pauperis.*] Application for leave to appeal in formâ pauperis to the Court of Appeal by a party who has not sued or defended in formâ pauperis in the Court below, must be made ex parte to the Court of Appeal. Upon such an application the provisions of Order XVI., rr. 22, 23, 24, as to proceedings by or against paupers, must be followed by analogy, as though they were in terms made applicable to appeals.—*In re Roberts, Kiff* v. *Roberts* (33 Ch. D. 265) followed. EX PARTE GOLDBERG - - - **C. A. 417**

2. —— *Charging Order—Shares—Director of Company — Qualification — Possession of Shares "in his own right"*—1 & 2 *Vict. c.* 110, *s.* 14.] A director of a railway company, incorporated by an Act providing that the qualification of a director should be the possession in his own right of a certain number of shares, sold his shares; but his name remained on the register as the person entitled to the shares, and he continued to act as a director. A judgment creditor of the director having applied for a charging order on the shares under 1 & 2 Vict. c. 110, s. 14:—*Held*, that the director might have possession of the shares in his own right without being the beneficial owner; that there was no illegality in the transaction with regard to the sale of the shares; that the purchasers were not estopped from setting up that they were the persons beneficially entitled; and that a charging order could not be made.—*Pulbrook* v. *Richmond Consolidated Mining Co.* (9 Ch. D. 610) and *Cooper* v. *Griffin* ([1892] 1 Q. B. 740) followed. HOWARD *v.* SADLER [1

3. —— *Costs — Discretion of Court over — "Good Cause"—Trial by Jury—Plaintiff successful on the event of the Action—Items of Damage on which Defendant successful—Order* LXV., *r.* 1.] No closer definition can be given of what will constitute "good cause," under Order LXV., r. 1, for making an order in a case tried with a jury that costs shall not follow the event, than that there will be good cause, whenever it is fair and just as between the parties that such an order should be made.—In an action for breach of a contract to put the drainage of a house into good condition, which was tried with a jury, the plaintiff claimed as special damage certain items in respect of expenses incurred by him in consequence of an illness which broke out in his family. The plaintiff did not make this claim oppressively or vexatiously, but was acting on an opinion expressed by his medical man that such illness was occasioned by defective drainage. The jury gave a verdict in the action for the plaintiff, but found, with regard to the special damage claimed as above mentioned, that the illness in plaintiff's family did not arise from the defects in the drainage:—*Held*, that there was "good cause" for making an order that the plaintiff, though successful in the action, should pay to the defendants the costs of the items of special damage in respect of which he had failed. FORSTER *v.* FARQUHAR - - - **C. A. 564**

4. —— *Costs—Taxation—Refresher Fees to Counsel—Order* LXV., *r.* 27, *sub-r.* 48.] By Order LXV., r. 27, sub-r. 48, where a cause is tried on viva voce evidence in open Court, "If the trial shall extend over more than one day, and shall occupy either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours without being concluded, the taxing officer may allow, for every clear day subsequent to that on which the five hours have expired, the following fees," &c.—The trial of a cause extended over parts of two days, and occupied four hours and a half on the first day, and five hours on the second day. Upon taxation of costs as between party and party, the master disallowed refresher fees to the successful party's counsel in respect of the second day:—*Held*, that refresher fees ought to have been allowed in re-

PRACTICE—*continued.*

spect of the second day, because the trial was substantially prolonged on that day beyond the time necessary to make up the five hours mentioned in the sub-rule, and the work done by counsel after the expiration of such five hours, was done on a "clear day" within the meaning of the sub-rule.—*The Courier* ([1891] P. 355) followed.—*Walker* v. *Crystal Palace District Gas Co.* ([1891] 2 Q. B. 300) not followed. O'HARA, MATTHEWS & Co. *v.* ELLIOTT & Co. - 362

5. —— *Counter-claim in Tort—Bankruptcy of Defendant—Action stayed except as to Counter-claim—Power to remit Counter-claim to County Court for Trial—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 66.] A counter-claim, even where by reason of the original action having been stayed it is the sole matter remaining to be tried between the parties, is not an "action" within s. 66 of the County Courts Act, 1888, and the Court has no jurisdiction under that section to order it to be remitted for trial to the county court. DELOBBEL-FLIPO *v.* VARTY - - - 663

6. —— *County Court—Costs—Action commenced in High Court and transferred to County Court—Recovery of Sum less than* 20*l.—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 116.] Sect. 65 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), gives power to a judge of the High Court in any action of contract brought in the High Court, and in which the claim does not exceed or is reduced to 100*l.*, on the application of either party, to order that the action shall be tried in any Court in which it might have been commenced, and provides that thereupon the action shall be tried in such Court as if it had been originally commenced therein, "and the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts, and the costs of the order and all proceedings previously thereto shall be allowed according to the scale of costs for the time being in use in the Supreme Court."—By s. 116: "With respect to any action brought in the High Court which could have been commenced in a county court . . . if, in an action founded on contract, the plaintiff shall recover a sum less than 20*l.* he shall not be entitled to any costs of the action."—The plaintiff brought an action of contract in the High Court which could have been commenced in a county court, and which, after some proceedings in the High Court, was transferred to a county court under the provisions of s. 65. He recovered a sum less than 20*l.*:—*Held*, affirming the judgment of the Queen's Bench Division, that s. 116 is applicable to all actions brought in the High Court which might have been brought in the county court whether tried in the High Court or ordered to be tried in the county court under s. 65, and that it applies to all costs of such actions, and not only to so much of them as in a case ordered to be tried in the county court have been incurred antecedently to such order, and that the plaintiff was therefore not entitled to any costs of the action. WHITE *v.* COHEN C. A. 580

7. —— *County Court—Payment into Court without Denial of Liability—How far an Admission of the Cause of Action—County Court Rules*, 1889, *Order* IX., *r.* 11, *Form* 104 (*a*).] In an action in the county court to recover 27*l.* for work done, the defendants paid 10*l.* into Court without any denial of liability:—*Held*, that the payment into Court admitted nothing but a liability to the amount of 10*l.*, and that, except as to that amount, the defendants were not precluded from shewing that the work was not done at their request. HENNELL *v.* DAVIES - - 367

8. —— *Discovery — Interrogatories, setting aside or striking out—Order* XXXI., *r.* 7.] By Order XXXI., r. 7, "any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous."—*Held*, that the above rule applies to interrogatories administered with leave as well as to those administered without leave; and that under its terms all or any of a set of interrogatories may be set aside as being unreasonably or vexatiously exhibited, or may be struck out as being prolix, oppressive, unnecessary, or scandalous.—If the Court are of opinion, looking at a set of interrogatories as a whole, that they are unreasonably or vexatiously exhibited, or are prolix, oppressive, unnecessary, or scandalous, they may set aside or strike out the whole of the interrogatories, although there may be some interrogatories among them which, taken alone, would be unobjectionable.—*Sammons* v. *Bailey* (24 Q. B. D. 727) disapproved of. OPPENHEIM & Co. *v.* SHEFFIELD - - - - C. A. 5

9. —— *Execution—Receiver, Appointment of—Equitable Execution—Future Earnings of Judgment Debtor—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.] The Court has not jurisdiction to enforce satisfaction of a judgment debt by appointing a receiver of the future earnings of the judgment debtor.—The Court cannot grant "equitable execution" by the appointment of a receiver in a case where prior to the Judicature Acts no Court could grant such relief. HOLMES *v.* MILLAGE - - - - - C. A. 551

10. —— *Notice of Trial—Reply—Close of Pleadings—Order* XXIII., *r.* 1; *Order* XXVII., *r.* 13; *Order* XXXVI., *r.* 11.] Where a plaintiff does not deliver a reply, he cannot give notice of trial until the expiration of twenty-one days after the delivery of the statement of defence. ROBINSON *v.* CALDWELL - - - - - 519

11. —— *Particulars, Order for—Terms on which Order can be made—Action to be dismissed unless Particulars given—Order* XIX., *r.* 7.] By Order XIX., r. 7. "A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just."—*Held*, affirming an order of the Queen's Bench Division, that where a plaintiff is ordered to give particulars, one of the terms of the order may be that the action shall be dismissed unless the particulars are delivered within a certain time. DAVEY *v.* BENTINCK - - C. A. 185

12. —— *Parties—Misjoinder of Plaintiffs—Action for Slander—Claims for several Slanders*

PRACTICE—*continued.*

spoken of different Persons—Order XVI., r. 1.] By Order XVI., r. 1, "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative."—Two plaintiffs joined in an action for slander, and delivered a statement of claim alleging several different slanders, some of one plaintiff, and some of the other:—*Held*, that the plaintiffs were improperly joined, and that they must elect which plaintiff would proceed, and that so much of the statement of claim as related to the other plaintiff must be struck out. —*Booth* v. *Briscoe* (2 Q. B. D. 496) and *Gort* v. *Rowney* (17 Q. B. D. 625) discussed. SANDES *v.* WILDSMITH - - - - - 771

13. —— *Parties—Non-joinder of Defendants —Foreigner resident out of Jurisdiction—Application to add as Defendant—Order XVI., r. 11—Discretion—3 & 4 Wm. 4, c. 42, s. 8.*] Where an action was brought against one only of two joint contractors, the other being a foreigner resident out of the jurisdiction:—*Held*, by the Court of Appeal (affirming the decision of Day and Collins, JJ.), that the defendant was not entitled as of right, under Order XVI., r. 11, to have the other joint contractor added as a defendant; and that, as a matter of discretion, the Court ought not, under the circumstances, to order that he should be added.—*Semble*, that Order XVI., r. 11, gives a discretion as to adding defendants; but as a rule such discretion ought to be exercised in accordance with the principles upon which, before the Judicature Act, a plea in abatement would have succeeded or failed. WILSON, SONS & Co. *v.* BALCARRES BROOK STEAMSHIP COMPANY [C. A. 422

14. —— *Parties—Non-joinder of Plaintiffs— Action for Damage to Reversion—Action for Breach of Covenant—Severance of Reversion after Demise—Right of one Tenant in common to maintain Action.*] Where a lease is granted by one person, containing a covenant with the lessor, which runs with the land, and after the execution of the lease the lessor devises his reversion in such a way that it becomes severed, and vests in several tenants in common, one of such tenants in common can maintain an action to recover damages, either for a wrongful act causing injury to the reversion, or for breach of the covenant, without joining the other tenants in common as plaintiffs. ROBERTS *v.* HOLLAND - - - - - 665

15. —— *Parties—Persons having the same Interest in one Cause or Matter—Order authorizing one or more to defend on behalf of all—Power to make Order against the Will of the Defendant— Order XVI., r. 9.*] An order may be made, under Order XVI., r. 9, authorizing one or more persons to defend on behalf of all persons interested, against the will of the person or persons so authorized.—The plaintiff, a member of a labour protection league, sued to enforce his rights under a rule of the league, which provided that, in case of a member being permanently disabled by an accident, a levy should be made on the members of the league for his benefit, and applied for an order authorizing the president and secretary of the league to defend on behalf of all the members. The president and secretary opposed the application:—*Held*, that an order could properly be made. WOOD *v.* MCCARTHY - - - - 775

16. —— *Parties—Persons having the same Interest in One Cause or Matter—Suing One of a Number of Persons on behalf of all—Trade Union —Action for Maliciously procuring Breaches of Contract—Order XVI., r. 9.*] Order XVI., r. 9, provides that, where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested.—The writ of summons in an action stated that the plaintiff sued the defendants, who were respectively the officers of several trade unions, as well on their own behalf as on behalf of and representing all the members of each of the societies to which they respectively belonged. The action was for maliciously and wrongfully procuring and coercing persons, who had entered into contracts with the plaintiff, to break such contracts and to refuse to enter into other contracts with the plaintiff, and for conspiracy to injure the plaintiff. The plaintiff claimed damages and an injunction:—*Held*, affirming the decision of a Divisional Court, that the case was not within Order XVI., r. 9, and the writ must be amended by striking out the words indicating that the defendants were sued in a representative capacity.—Order XVI., r. 9, applies only to persons who have or claim some proprietary right, which they are asserting or defending in the cause or matter. TEMPERTON *v.* RUSSELL - - - - - C. A. 435

17. —— *Reference of Cause or Matter—Question in Dispute Consisting wholly or in part of Matters of Account—Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 14 (c).*] Under the Arbitration Act, 1889, s. 14 (*c*), where any part of the dispute in a cause or matter relates to a matter of account, the cause or matter may be compulsorily referred, although in certain events it may become unnecessary to determine the matter of account. HURLBATT *v.* BARNETT & Co. - - C. A. 77

18. —— *Reference of Matters in dispute in Action — Inspection of Property, subject of the Action, jurisdiction to Order—Concurrent jurisdiction of Judge and Referee—Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 14, 15—Order XXXVI., r. 50; Order L., r. 3.*] Where all matters in dispute in an action are referred to a referee or arbitrator under the Arbitration Act, 1889, s. 14, the Court or a judge still has jurisdiction to make an order for inspection of property, the subject of the action; but the referee or arbitrator likewise has jurisdiction to make such an order; and, *semble*, ordinarily the more convenient course is, that application for such an order should be made to him in the first instance, and not to a judge at chambers. MACALPINE & Co. *v.* CALDER & Co. [C. A. 545

19. —— *Security for Costs — Counter-claim arising out of same Transaction as Claim—Counter-claim substantially amounting to Defence—Discretion.*] Where a defendant resident out of the jurisdiction set up a counter-claim which arose out of the same transaction as the claim and was in substance, though not technically, in the

PRACTICE—*continued.*

nature of a defence to the action:—*Held*, that the Court had a discretion to refuse to order the defendant to give security for the costs of the counter-claim. NECK *v.* TAYLOR - C. A. 560

20. —— *Service out of Jurisdiction—Appearance under Protest—Order XI.*] A foreigner resident out of the jurisdiction, who had been served out of the jurisdiction with a notice of a writ of summons, appeared under protest; in the margin of the appearance was a memorandum that it was entered under protest in order to preserve the defendant's right to object to the jurisdiction:—*Held*, that the defendant could properly enter an appearance under protest without losing his right to object to the jurisdiction. FIRTH & SONS *v.* DE LAS RIVAS - - - 768

21. —— *Service out of Jurisdiction—Co-Defendants within Jurisdiction—"Action properly brought"—Rules of Supreme Court*, 1883, *Order XI., r.* 1 (*g*).] Order XI., r. 1 (*g*), by which service out of the jurisdiction of a writ of summons may be allowed whenever "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction," applies where a plaintiff, acting bonâ fide, and not proceeding against the person who is served within the jurisdiction solely for the purpose of bringing in the person out of the jurisdiction, has, at the time of service of the writ, an apparent cause of action against the person served within the jurisdiction, and, therefore, in such a case, service on the person out of the jurisdiction may be allowed.—The rule applies where it appears, at the time of the service of the writ, that the plaintiff has an alternative claim against either the person within the jurisdiction or the person out of the jurisdiction, though it cannot be ascertained until the trial which of the two is liable. WITTED *v.* GALBRAITH. [*See next case*] - 431

22. —— *Service out of Jurisdiction—Co-Defendant within the Jurisdiction—"Action properly brought"—Rules of Supreme Court*, 1883, *Order XI., r.* 1 (*g*).] In order to bring a case within Order XI., r. 1 (*g*), under which service out of the jurisdiction of a writ of summons may be allowed whenever "any person out of the jurisdiction is a necessary and proper party to an action properly brought against some other person duly served within the jurisdiction," the plaintiff must have an apparent cause of action against the person served within the jurisdiction, and must not merely have joined such person in order to be able to sue, within the jurisdiction, a person who is out of the jurisdiction. WITTED *v.* GALBRAITH - - - - C. A. 577

23. —— *Writ of Summons—Service out of Jurisdiction — Ireland — Co-Defendant within Jurisdiction—Action of Tort—Order XI., r.* 1 (*g*).] By Order XI., r. 1, "service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the Court or a judge, (*g*) whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction":—*Held*, that under clause (*g*) service out of the jurisdiction may be allowed in actions of tort. CROFT *v.* KING - - - - - - 419

24. —— *Solicitor—Agreement as to Costs—Proceedings to set aside Agreement—Application at Chambers—Summons—Attorneys and Solicitors Act*, 1870 (33 *&* 34 *Vict. c.* 28), *s.* 8—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 39.] An application under s. 8 of the Attorneys and Solicitors Act, 1870, made in the Queen's Bench Division, to set aside an agreement between a solicitor and his client as to costs, may be made at chambers upon a summons. IN RE HOWELL THOMAS 670

25. —— *Striking out Pleadings—Slander—Defamatory Words set out in Statement of Claim—Defence, that different Words were spoken, and were True and Privileged—Embarrassing Pleading.*] To a statement of claim setting out defamatory words, alleged to have been spoken by the defendant of the plaintiff, the defendant pleaded that he "did say the following words," and proceeded to set out his own version of what he had said, which differed materially from the words set out in the statement of claim; and then alleged that the words spoken by the defendant were true in substance and in fact, and were spoken on a privileged occasion.—On a motion to strike out this defence:—*Held*, that the defence, as pleaded, was embarrassing, and tended to prejudice the fair trial of the action, and must therefore be struck out. RASSAM *v.* BUDGE 571

26. —— *Writ specially Indorsed—Application for Judgment—Amendment of Indorsement after Appearance and before Summons taken out—Order III., r.* 6; *Order XIV., r.* 1.] The defendant appeared to a writ which contained a claim for interest (not alleged to be due by statute or under any contract), and which was therefore not a writ specially indorsed under Order III., r. 6. The plaintiff obtained an order to amend the writ by striking out the claim for interest, and having amended it accordingly, he took out a summons for judgment under Order XIV., r. 1:—*Held*, that the writ having, by the amendment, become a good specially indorsed writ under Order III., r. 6, the appearance was an appearance to a specially indorsed writ, and Order XIV., r. 1, applied. PAXTON *v.* BAIRD - - 139

27. —— *Writ specially Indorsed—Leave to sign Judgment—Averment of Condition Precedent—Order III., r.* 6—*Order XIV., r.* 1.] The indorsement upon a writ of summons stated that the plaintiff's claim was for a sum of 210*l.*, payable under an agreement, which was set out, and by which the defendant undertook, upon the plaintiff delivering up to the defendant's husband certain acceptances, to pay to the plaintiff on demand 210*l.*, owing by her husband to the plaintiff for cash advanced:—*Held*, that the indorsement constituted a good special indorsement within Order III., r. 6, although it contained no averment that the bills had been delivered up by the plaintiff to the defendant's husband. BRADLEY *v.* CHAMBERLYN - - - - 439

—— Appeal to Court of Appeal—Arbitration Act, 1889—Special case - - 375
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—— Counter-claim—Declaratory judgment 142
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—— Indorsement on writ—Bill of exchange—"Bank charges" - - - 318
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—— Liverpool Court of Passage—Admiralty jurisdiction—Rule—Empowering registrar to give summary judgment—Invalidity - - - - 98
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PRINCIPAL AND AGENT—*Liability of Principal—Undisclosed Principal—Unauthorized Acts of Agent.*] The defendants, a firm of brewers, who were the owners of the business of a beerhouse, appointed a manager of the business; the licence was always taken out in the name of the manager, whose name also appeared over the door. By the agreement between the defendants and their manager, the latter was forbidden to purchase certain articles for the purpose of the business, which were to be supplied by the defendants; but the manager, in contravention of his instructions, ordered such articles from the plaintiff for use in the business; the plaintiff supplied the goods and gave credit for them to the manager only. Subsequently, upon discovering that the defendants were the real owners of the business, the plaintiff sued them for the value of the goods:—*Held*, that the plaintiff was entitled to maintain the action, for the defendants, as the real principals, were liable for all acts of their agent which were within the authority usually conferred upon an agent of his particular character, although he had never been held out by the defendants as their agent, and although the authority actually given to him by them had been exceeded. WATTEAU *v.* FENWICK - 346

2. —— *Sale of Real Property—Payment of Deposit to Solicitor as Agent—Action to recover Deposit from Agent.*] On the sale of premises by auction the purchaser paid a deposit to the vendor's solicitor as agent for the vendor. The sale went off through the default of the vendor, and the purchaser brought an action to recover the deposit from the solicitor:—*Held*, that the payment of the deposit to the solicitor was equivalent to payment to the vendor, and that the action could not be maintained. ELLIS *v.* GOULTON - - - - C. A. 350

—— Person employed to sell on commission—Goods pledged with pawnbroker—Validity of pledge - - - 62
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PROBATE—Duty—Bonâ fide mistake in valuation—Liability of executor after close of administration - - - 239
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RAILWAY COMPANY—*Negligence—Robbery of Passenger—Refusal to Detain Train—Overcrowding of Carriage—Damages, remoteness of.*] A statement of claim stated, in substance, that the plaintiff, while a passenger in one of the defendants' trains, which was then stopping at a railway station, was robbed by a gang of men who entered the carriage in which he was seated; that there was a force of police at the station at the time; that the plaintiff complained to the station-master of the robbery, but he refused to detain the train to permit the plaintiff to give the said men into custody, and have them searched; that, upon the plaintiff's complaint being made to him, the station-master gave the signal to start the train, which was accordingly started; that the plaintiff was thereby prevented from having the said men searched and his property recovered; and that the stolen property was in the carriage when the plaintiff complained to the station-master, and might and would have been recovered, if he had afforded time for the necessary search:—*Held*, that the statement of claim disclosed no cause of action.—A passenger claimed to recover as damages from a railway company a sum of money, of which he had been robbed, in consequence, as he alleged, of the company's negligence in allowing their carriage to be overcrowded:—*Held*, that the damage claimed for was too remote. COBB *v.* GREAT WESTERN RAILWAY COMPANY - C. A. 459

RECEIVER—Appointment of—Future earnings of judgment debtor - - 551
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REGISTRY ACTS (YORKSHIRE)—*Agreement for Sale of Land—"Assurance"—"Conveyance"—"Memorandum of Charge"—Yorkshire Registries Act*, 1884 (47 & 48 *Vict. c.* 54), *ss.* 3, 4, 14.] A memorandum of agreement for the sale of land stated that, in consideration of 200*l.* then paid by the purchaser, the vendor agreed to complete certain buildings on the land, and the purchaser agreed to purchase the same when completed at the price of 750*l.*, the above sum of 200*l.* to be considered as in so much reduction of the purchase-money:—*Held*, that such memorandum was not an "assurance" capable of registration within the meaning of the Yorkshire Registries Act, 1884. RODGER *v.* HARRISON - C. A. 161

REVENUE—*Probate Duty—Bonâ fide Mistake in Valuation—Liability of Executor after close of Administration—"Person acting in the Administration of the Estate"—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 32.] By s. 32 of the Customs and Inland Revenue Act, 1881, it is provided that, if at any time it "shall be discovered that the personal estate and effects of a deceased person were at the time of the grant of the probate of greater value than the value mentioned in the certificate, the person acting in the administration of such estate and effects shall deliver a further affidavit with an account to the Commissioners of Inland Revenue duly stamped for the amount which, with the duty (if any) previously paid in respect of such

REVENUE—*continued.*

estate and effects, shall be sufficient to cover the duty chargeable according to the true value thereof."—A testator bequeathed certain pictures and other property to be held by trustees as heir-looms. His executors caused a valuation to be made for probate purposes, and delivered to the Commissioners of Inland Revenue an affidavit of value, with an account on the basis of such valuation duly stamped in accordance with the provisions of the Customs and Inland Revenue Act, 1881. Upon this a certificate was issued, stating the value, as shewn by the account, and probate was granted. Some time after the executors had finally wound up the estate it was discovered that one picture had been omitted from the valuation, and that the others had been considerably undervalued. No suggestion was made of any negligence on the part of the executors, or of any incompetence on the part of the valuer. On an information praying that the executors might be ordered to deliver a further affidavit and account in accordance with the provisions of s. 32:—*Held*, by the Court of Appeal, affirming the decision of the Divisional Court, that the executors, having completed the duties of administration, were not "persons acting in the administration of the estate" within the meaning of the section, and were not liable. ATTORNEY GENERAL *v.* SMITH - C. A. 239

2. —— *Succession Duty—Interests for Life and in Remainder—Acceleration of Succession—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15, 20, 38.] Under a marriage settlement a fund was vested in trustees in trust for the wife for life, with remainder to the husband for life, with remainder, in default of issue, to the wife absolutely, if she survived the intended coverture. There was no issue of the marriage, and the wife survived the husband:—*Held* (affirming the judgment of a Divisional Court), that upon the death of the husband a succession was taken by the wife, in respect of which succession duty was then payable on the amount of the fund, less the value of her life interest therein. ATTORNEY GENERAL *v.* ROBERTSON - - - - C. A. 293

RIVER—*Navigation—Look-out on board Steam-vessel—By-laws—Inconsistency.*] The 99th by-law made under the provisions of the Watermen's and Lightermen's Amendment Act, 1859, which requires the master or other person having the command or management of any steamboat navigated on the river Thames to cause a proper look-out to be kept from the bow of such steamboat, is not inconsistent with or repealed by the 36th by-law made under the provisions of the Thames Conservancy Act, 1864, which requires the master of every steam-vessel navigating the river to cause a proper look-out to be kept from the said steam-vessel during the whole time it is under way. Where, therefore, no look-out was, in fact, kept from the bow, and the captain was summoned and fined under the former by-law:—*Held*, that the conviction was right. GOSLING *v.* GREEN - - - - - - 109

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See PRACTICE. 4.

SALE OF GOODS—*Sale by Sample—Acceptance—Inspection at place of Delivery—Right of Purchaser to reject.*] The plaintiff sold barley to the defendant by sample, to be delivered at T. railway station, which was near the plaintiff's farm. On the same day the defendant re-sold the barley to a brewer. Afterwards the plaintiff discovered that his servants had by mistake mixed some inferior barley with the barley sold to the defendant, and gave the defendant notice of the mistake, offering to make good any deficiency of quality. He duly delivered the barley at T. Station, and while it was there the station-master, at the defendant's request, took a bulk sample of the barley and sent it to the defendant. The defendant having received the bulk sample, directed the station-master to send on the barley to the brewer who had purchased it; but he rejected it as not being according to the sample. The defendant then himself claimed to be entitled to reject the barley:—*Held*, that there was nothing in the contract or the circumstances to rebut the presumption that the place of delivery was to be the place of inspection; and that as the defendant had inspected a sample at such place of delivery, and ordered the barley to be sent on to the sub-purchaser, he must be considered to have accepted the barley, and could not afterwards reject it. PERKINS *v.* BELL - C. A. 193

SAMPLE—Sale of goods by sample—Acceptance—Rejection at place of delivery - 193
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SCHOOL BOARD — Head master — Authority — Punishment of pupil for acts done on way to school - - - 465
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SHIP — *Merchant Shipping Acts — Passenger Steamer—"Vessel used in Navigation"—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 2, 303, 318.] By s. 318 of the Merchant Shipping Act, 1854, "If any passenger steamer plies . . . with any passengers on board without having one of the duplicates (of her Board of Trade certificate) put up in some conspicuous part of the ship," the owner shall be liable to a penalty. And by s. 2 of the same Act, "'ship' shall include every description of vessel used in navigation not propelled by oars."—A launch was used for the purpose of carrying passengers on pleasure trips round an artificial lake half a mile long by 180 yards wide, without having any duplicate of a Board of Trade certificate put up in her:—*Held*, that the launch, while so used on a sheet of water of that size, was not a vessel used in navigation, and, therefore, not a passenger steamer within the meaning of s. 318. MAYOR, &c., OF SOUTHPORT *v.* MORRISS - - 359

2. —— *Offences by Seamen—Summary Proceedings — "Sea-going Ship," what is — Th Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 109, 243.] By s. 109 of the Merchant Shipping Act, 1854, "the whole of the third part of this Act shall apply to all sea-going ships registered in the United Kingdom"; and s. 243 in the third part of the Act enables seamen to be punished summarily in the specified way for certain offences.—The respondent was engaged on a screw steamer, of about 142 tons gross tonnage, registered as a British ship at the port of Liverpool. She was exclusively used to carry salt upon the rivers Weaver and Mersey from Winsford to Liverpool, where it was transferred to ocean-going vessels. Her voyages, so far as they were upon the river Mersey, were in tidal waters, but did not extend in such tidal waters beyond the limits of the port of Liverpool:—*Held*, that the ship was not a "sea-going" ship within the

SHIP—*continued.*
meaning of s. 109 of the Merchant Shipping Act, 1854, and, therefore, that proceedings could not properly be taken against the respondent under s. 243. THE SALT UNION *v.* WOOD - 370

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SOLICITOR—*Bill of Costs—Sale of Property by Auction—Commission of Vendor's Solicitor for Sale of Property in Lots—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order, Sched. I.*] The commission payable to a vendor's solicitor, under Sched. I. of the General Order under the Solicitors' Remuneration Act, 1881, "for conducting a sale of property by public auction . . . . when the property is sold," is chargeable upon the total amount realized by the sale, even though the property be sold in lots, and though the lots be held by the vendor under different titles, and be sold to different purchasers. *In re* ONWARD BUILDING SOCIETY [16

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TITHES—*Hop-grounds or Market-gardens—Rent-charge in lieu of Extraordinary Charge—Exemption from Land Tax*—49 & 50 *Vict. c.* 54, *ss.* 3, 4, *sub-s.* 5.] The annual rent-charge payable under the Extraordinary Tithe Redemption Act, 1886 (49 & 50 Vict. c. 54), in lieu of the extraordinary charge previously levied, under the Tithe Commutation Acts, on hop-grounds, orchards, fruit plantations, and market-gardens, is exempt from land tax. CARR *v.* FOWLE - - - 251

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WATERWORKS—*Purchase of Mains and Pipes and Fittings—Principle of Valuation—Practice—Appeal—Arbitration Act*, 1889, *s.* 19.] The Stockton and Middlesborough Corporation Waterworks Act, 1876 (39 & 40 Vict. c. ccxxx.), provides for the transfer of the undertaking of a waterworks company to the "Stockton and Middlesborough Water Board," and empowers the Board to construct further works to improve the supply of water in Stockton and Middlesborough and in outlying districts. By s. 4, the limits of the Act for the supply of water are to include the company's present limits and certain specified places beyond such limits, and it is provided that the Board "shall, when so required by the sanitary authority of any district beyond the boundaries of the boroughs of Stockton and Middlesborough respectively, sell to such sanitary authority, all mains, pipes, and fittings belonging to the board within that district" . . . at a price

WATERWORKS—*continued.*
to be fixed, in default of agreement, by arbitration, and after such sale the Board shall cease to supply water within such district.—In an arbitration under the foregoing section, the arbitrator made his award in the form of a special case for the opinion of the Court, in which he stated that in fixing the price of mains, pipes, and fittings (sold by the Board to the sanitary authority of an outlying district) at a specified sum, he took into consideration the loss of revenue earned by the Board by the supply of water through such mains, pipes, and fittings; but if the Court should be of opinion that this basis of calculation was wrong, he fixed this price at a lower figure:—*Held*, first, that an appeal lay from the judgment of a Divisional Court upon such special case to the Court of Appeal.—*In re Knight and Tabernacle Permanent Building Society* ([1892] 2 Q. B. 613) distinguished.—Secondly, that the basis of calculation adopted by the arbitrator was wrong, and that the price to be ascertained was the reasonable price of such mains, pipes, and fittings regarded as apparatus fitted in the ground and capable of earning a profit, but without any compensation to the Board for the loss of the right of supplying water within the district. *In re* KIRKLEATHAM LOCAL BOARD AND STOCKTON AND MIDDLESBOROUGH WATER BOARD [C. A. 375

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